COURT OF APPEALS
DECISION
DATED AND FILED

October 5, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1528 **Cir. Ct. No. 2014CV9924**

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

SECURANT BANK & TRUST,

PLAINTIFF-RESPONDENT,

V.

OUTER LIMITS INVESTMENTS LLC, SHAWN A. BRUNNER AND MILWAUKEE CITY,

DEFENDANTS,

BULLDOG ENTERPRISES LLC,

DEFENDANT-APPELLANT,

GARY SCHAEFER,

RECEIVER.

APPEAL from a judgment of the circuit court for Milwaukee County: STEPHANIE G. ROTHSTEIN, Judge. *Affirmed.*

Before Sherman, Blanchard, and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Securant Bank & Trust filed an action naming multiple individuals and entities seeking multiple money judgments and foreclosure on multiple properties. The circuit court granted summary judgment in favor of Securant. Only Bulldog Enterprises, LLC, appeals. We affirm for the following reasons.

BACKGROUND

This Foreclosure Action

¶2 In November 2014, Securant initiated this foreclosure action, naming as defendants Bulldog Enterprises, LLC, Outer Limits Investments, LLC, and Outer Limits member Shawn Brunner.[1] Securant sought money judgments and foreclosures on 13 properties in Milwaukee, grouped in two sets: six owned by Outer Limits ("the Outer Limits Properties") and seven owned by Shawn ("the Shawn Properties") (collectively, "the 13 properties"). Securant claimed that it was entitled to first position mortgage liens on each of the 13 properties and that the interests of all named defendants in the properties were inferior to Securant's interests.

[1] We will generally use first names to refer to Shawn Brunner and his father, Todd Brunner, who is referenced extensively below.

¶3 Bulldog responded that it had interests in three of the 13 properties, which precluded at least some relief sought by Securant. More specifically, Bulldog alleged that in December 2010, before Securant obtained an interest in any of the 13 properties, Bulldog had transferred to Shawn a subset of the seven Shawn properties, namely, three properties on North 38th Street ("the 38th Street Properties"), and that in return Outer Limits and Shawn "obligated themselves" in a note to pay Bulldog $107,685.13. According to Bulldog in its response, this agreement, which we will call "the December 2010 Bulldog-Outer Limits agreement," reflected the shared intention of Bulldog, Shawn, and Outer Limits "that Bulldog be granted a first-position mortgage lien on the 38th Street Properties" in order "to secure repayment" by Outer Limits and Shawn on the note. However, Bulldog's response acknowledged that, despite that intention, the parties failed in 2010 to have a mortgage recorded in favor of Bulldog.

¶4 Securant moved for summary judgment seeking foreclosure on three mortgages held by Securant, which in each case identified as security each of the 13 properties, and which were recorded, respectively, in July 2012 (with Outer Limits), September 2012 (with Shawn and Outer Limits), and November 2013 (with Shawn). In its motion, Securant argued that Outer Limits and Shawn had stipulated that they had failed to pay Securant on guaranties and a business note totaling $632,059.83 and secured by Securant's mortgages, and that Securant's mortgages "[a]re [s]uperior to" any mortgage interest claimed by Bulldog.

¶5 Included in materials that Securant submitted with the summary judgment motion was a stipulation between the parties, which established facts that include the following.

Stipulated Facts

¶6 In April 2012, Securant entered into a forbearance agreement with Todd, Shawn, and others, arising out of significant debts owed to Securant. As inducement to Securant to forbear from enforcing remedies on previously existing loan and collateral agreements, Outer Limits, by Shawn, executed Securant's July 2012 recorded mortgage with Outer Limits.

¶7 In August 2012, Shawn and Outer Limits relied on a note with Securant to borrow $135,000. As security for the August 2012 note, as well as security for all other obligations of Outer Limits and Shawn to Securant under a "dragnet clause"[2] contained in the August 2012 note, Shawn executed Securant's September 2012 recorded mortgage with Shawn and Outer Limits.

¶8 After Shawn and Outer Limits defaulted on the August 2012 note, Shawn and Outer Limits entered into an additional forbearance agreement with Securant in November 2013. As required by the two forbearance agreements, three events occurred: (1) in October 2013 Outer Limits, by Shawn, delivered to Securant a continuing guaranty of past, present, and future obligations of Todd and others to Securant up to $514,000; (2) Shawn individually made the same continuing guaranty at the same time; and (3) Shawn executed Securant's November 2013 recorded mortgage with Shawn.

¶9 Securant's three mortgages referenced above were each in default. In addition, Outer Limits and Shawn stipulated that $118,059.93 was due on the

[2] A "dragnet clause" in a mortgage deed provides that a mortgage secures all the debts that the mortgagor may at any time owe to the mortgagee.

August 2012 note and that $514,000 was due on the October 2013 Outer Limits and Shawn guaranties.

Bulldog Affidavits In Opposition To Summary Judgment

¶10 Bulldog submitted an affidavit from Todd, who averred in part the following. In 2010, Bulldog purchased from Todd the 38th Street Properties for $107,685.13, which precisely equaled the outstanding balance that Todd owed a lender on these properties. However, shortly thereafter, Todd and Bulldog agreed to "unwind the transaction" in the following way: Bulldog would transfer the 38th Street Properties to Shawn in exchange for a mortgage lien on the 38th Street Properties securing payment of $107,685.13. Shawn would own and manage the properties while Bulldog recouped the $107,685.13 through installment payments. Although this transaction was executed through various oral statements and documents that Bulldog contends can be construed as contributing to the creation of a mortgage, the details of which do not matter to any issue we resolve on appeal, no Bulldog mortgage on the 38th Street Properties was recorded.

¶11 We discuss in detail below additional averments that Todd made to the effect that he informed Securant representatives, before he signed documents related to the April 2012 forbearance agreement, "that Bulldog had or should have had a first lien position on" the 38th Street Properties.

¶12 Bulldog also submitted an affidavit from Bulldog member Debra Kraemer, who averred in part the following. Bulldog agreed to transfer the 38th Street Properties to Shawn with the understanding that this loan would be secured by the 38th Street properties. Through Outer Limits, Shawn made monthly payments based on this understanding during the period January 2011–May or June 2013. After Bulldog learned in the summer of 2013 "that the Brunners never

finalized or recorded a mortgage lien against the 38th Street properties," Shawn agreed in July 2013 to "re-execute the note for $107,685.13, and give a mortgage to Bulldog on the original [three] 38th Street Properties," "plus the ten additional properties subject to this foreclosure action."

Additional Facts

¶13 The following additional facts are undisputed. Securant obtained a title report in April 2012 on the 13 properties, which reflected no record or reference to any prior mortgage to Bulldog. In addition, Bulldog conceded at oral argument that there is no dispute that no one provided Securant with any documentation of any prior mortgage to Bulldog on any of the 13 properties before Securant recorded its 2012 mortgages.

¶14 Separately, a mortgage was recorded on August 1, 2013, the effect of which is disputed by the parties, as discussed below. It is sufficient as background to know that this purported to be an Outer Limits mortgage to Bulldog, securing payment of $107,685.13 and secured by the 13 properties, and purported to "evidence[] … a note or notes, or other obligation … dated December 19, 2010 executed by [Outer Limits]." We will refer to this as "the disputed August 2013 recorded mortgage."

Summary Judgment Arguments Of The Parties

¶15 Based on stipulated facts and documents of unchallenged authenticity, Securant argued that it had made out an unrebutted prima facie case that Shawn and Outer Limits had breached or were in default of the agreements, notes, and mortgages in its favor summarized above, entitling it to $632,059.83, secured by mortgages that are superior to any interest of Bulldog.

¶16 In response, Bulldog did not object to the court entering in Securant's favor judgments of foreclosure against each of the 13 properties or to the requested money judgment against Shawn and Outer Limits. However, as pertinent to the issues raised on appeal, Bulldog argued that Securant's summary judgment motion should be denied in other respects based on a genuine issue of material fact regarding the priority of mortgage interests, because Bulldog could establish a first position mortgage lien against the three 38th Street Properties and a second position mortgage lien, ahead of Securant's November 2013 mortgage, against the other four Shawn Properties. Bulldog moved for summary judgment.

Circuit Court Decisions

¶17 In December 2015, the circuit court[3] granted Securant's summary judgment for foreclosure "of its mortgages," and denied Bulldog's cross motion for summary judgment, but took under advisement the issues of mortgage priority and damages. In June 2016, the court made the following determinations pertinent to the issues raised on appeal: as to mortgages on the six Outer Limits Properties, the first position and second position mortgage liens belonged to Securant, and the third position to Bulldog; as to the seven Shawn Properties, the first position belonged to Securant and all other obligations were secondary

DISCUSSION

¶18 We held oral argument, which simplifies the issues on appeal. As the positions of the parties were clarified at oral argument, our resolutions of the

[3] The Hon. Mel Flanagan presiding. After Judge Flanagan issued the December 2015 summary judgment order, this case was transferred to the Hon. Stephanie G. Rothstein, who presided over the balance of the circuit court proceedings.

following two issues are dispositive in favor of Securant, and we express no opinions on any other issues raised by either side.[4]

¶19 The first issue relates to Bulldog's argument that it is the *first position* mortgage holder. As we discuss below, based on the evidence submitted by the parties we conclude that there is no genuine issue of material fact that, at the time Securant recorded its 2012 mortgages, Securant did not have actual or constructive notice of a mortgage interest held by Bulldog. Accordingly, we conclude that Bulldog's first position mortgage holder argument fails.

¶20 The second issue relates to Bulldog's argument that it is at least a *second position* mortgage holder. As also discussed below, construing the disputed August 2013 recorded mortgage, we conclude that it did not establish that Bulldog had a second position mortgage lien—behind a first held by Securant, but ahead of Securant's November 2013 recorded mortgage with Shawn. Bulldog submits that, if we were to conclude otherwise, some proceeds from the sale of property might properly belong to Bulldog.

¶21 We review summary judgments de novo, under the familiar process and the standards set forth in WIS. STAT. § 802.08(2). ***North Highland Inc. v.***

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[4] Bulldog conceded at oral argument that (1) it is not advancing an argument based on equitable subrogation and (2) if there is no genuine issue of material fact that Securant filed its 2012 mortgages without actual or constructive notice of an existing mortgage on the property held by Bulldog, then we cannot reach the potential issue of equitable reformation under WIS. STAT. § 706.04 (2015-16) in addressing Bulldog's argument that it has a first position mortgage lien. Bulldog did not concede, however, that it could not pursue an equitable reformation argument with regard to its contention that it has a second position mortgage lien, which we discuss as the second issue below.

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

Jefferson Mach. & Tool Inc., 2017 WI 75, ¶¶20-21,__ Wis. 2d ___, 898 N.W.2d 741. "A party opposing a motion for summary judgment must demonstrate that there exists a genuine issue of material fact." ***Id.***, ¶22 (citation omitted).

Securant's Actual Or Constructive Notice

¶22 Securant argues that Bulldog failed to present evidence to the circuit court supporting a reasonable inference that Securant had actual or constructive notice that Bulldog had a mortgage interest in the property at the time Securant recorded its 2012 mortgages. We agree. We will first explain the applicable legal standards on this first issue, which are not disputed by the parties, and then explain our conclusion.

¶23 As summarized above, the alleged December 2010 Bulldog-Outer Limits agreement did not result in a mortgage that could be discovered in a title search before Securant recorded its 2012 mortgages. The parties agree that this brings into play the race-notice statute, WIS. STAT. § 706.08(1)(a), and the "good faith purchaser" doctrine.

¶24 WISCONSIN STAT. § 706.08(1)(a) "protects purchasers of real estate against prior adverse claims that are not properly recorded as provided by law." *See* ***Bank of New Glarus v. Swartwood***, 2006 WI App 224, ¶15, 297 Wis. 2d 458, 725 N.W.2d 944. It provides that "every conveyance that is not recorded as provided by law shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate or any portion of the same real estate whose conveyance is recorded first." § 706.08(1)(a). This includes both subsequent purchasers and subsequent mortgagees. "A purchaser *or mortgagee* in good faith is one without notice of existing rights in land."

Grosskopf Oil, Inc. v. Winter, 156 Wis. 2d 575, 584, 457 N.W.2d 514 (Ct. App. 1990) (emphasis added).

¶25 Under the "good faith purchaser" doctrine, a good faith purchaser or mortgagee is one who lacks "notice, constructive or actual, of a prior conveyance." ***Kordecki v. Rizzo***, 106 Wis. 2d 713, 719-20, 317 N.W.2d 479 (1982). A purchaser in good faith is "deemed to have examined the record and to have notice of the contents of all instruments in the chain of title and of the contents of instruments referred to in an instrument in the chain of title." ***Kordecki***, 106 Wis. 2d at 719-20 (holding that purchaser had constructive notice that land contract vendee did not have power to sell property when reviewing a recorded lis pendens "would have led [the purchaser] to the ... circuit court file on the proceedings to foreclose the land contract and more specifically to the documents terminating the period of redemption").

¶26 With that background, the parties clarified at oral argument that they agree to the following propositions. Under the race-notice statute and the good faith purchaser doctrine, Securant is entitled to its claimed first position mortgage if the averments in the affidavits of Todd and Securant employee Steve Fleischman submitted on summary judgment do not constitute evidence that could support the inference that Todd informed Securant before its first pertinent recorded interest in 2012 that Bulldog had a *non-recorded* mortgage interest. More specifically, Bulldog does not seriously dispute that, on the facts here, notice of a *non-recorded* interest is all that could have mattered on the topic of whether Securant had notice of Bulldog's mortgage interest, because Bulldog does not claim that Securant had notice of Bulldog's mortgage interest through any other avenue and because it is uncontested that Securant conducted diligent, timely title

searches that did not reveal, and could not have revealed, Bulldog's alleged mortgage interest.

¶27 As pertinent to the analysis, Todd averred as follows:

> Prior to signing any documentation that would give Securant a mortgage on the 3 Properties as a result of the forbearance agreement, I informed representatives at Securant, including [Securant representatives] Gary Schaefer, Lou Herro and Steve Fleischman that Bulldog had or should have had a first lien position on the 3 Properties.
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> Prior to the forbearance agreement Shawn Brunner then secured a loan in the amount of $137,000 to pay taxes on his approx[imately] 15 properties which included the properties on N 38th Street. At the time Shawn secured the loan, I along with Shawn reiterated to Steve Fleis[c]hman that Bulldog held a first mortgage on those 3 properties with the others being free and clear.

¶28 We conclude that these averments contain no indication that Bulldog's claim to "h[o]ld a first mortgage" involved a *non-recorded* mortgage interest. Bulldog acknowledged at oral argument that, in ordinary conversation, when a person says that he or she has a mortgage on property, the person is referring to a *recorded* mortgage, and that an unrecorded mortgage is abnormal. With this fact acknowledged, we see no room for an argument that Securant was obligated, based on this statement of Todd's, to theorize about the possibility that Todd was referring to the abnormal unrecorded mortgage, and was for undisclosed reasons *withholding* from Securant even a passing reference to a mortgage with an abnormal origin or status.

¶29 At oral argument, Bulldog repeatedly attempted to convince us that it was sufficient to place Securant on notice of an unrecorded Bulldog interest that Todd averred that he told Securant that Bulldog "had *or should have had* a first

lien position." However, if anything, the phrase "or should have had" would seem to stand for the idea that *perhaps* Bulldog had an interest, or *perhaps* Bulldog had no interest at all, and that in any case a title search by Securant would resolve any uncertainty. Stepping back, Todd could have used many understandable formulations—including many shorthand formulations—to alert Securant to the December 2010 Bulldog-Outer Limits agreement and to the failure of the parties in 2010 to see to it that a mortgage in favor of Bulldog was recorded, but unexplained use of the phrase, "or should have had," is not among the understandable formulations.

¶30 Bulldog also directs us to the affidavit of Securant employee Fleischmann, whose pertinent averment states:

> In July, 2012, I was preparing the note and mortgage to secure the additional $135,000 loan to Outer Limits and Shawn Brunner for taxes. Todd Brunner told me he thought Bulldog had an interest in three properties. In an effort to verify the statements, I obtained an additional title report on the properties which would be mortgaged to Securant by Outer Limits and Shawn Brunner….
>
> … [which revealed] no record or reference to any prior mortgage to … Bulldog ….

Bulldog contends that one reasonable inference arising from Fleischmann's use of the phrase "he *thought* Bulldog had an interest," is that the word "thought" conveyed uncertainty, which required investigation by Securant beyond a title search. We reject this as an unreasonable interpretation. As with the phrase "or should have had," Todd using the phrase "I think" would have conveyed to Securant, at best for Bulldog, some unspecified basis for uncertainty about whether there was a mortgage at all, which in the ordinary course of events Securant could resolve through a title search.

¶31 For these reasons, we reject the only argument that Bulldog makes on the actual or constructive notice topic, which Bulldog acknowledges resolves its challenge to summary judgment, putting aside the second issue we now address.

Effect Of The Disputed August 2013 Recorded Mortgage

¶32 Bulldog argues that the disputed August 2013 recorded mortgage established a second position mortgage lien—behind a first held by Securant, but ahead of Securant's November 2013 recorded mortgage with Shawn—which would or could mean that some proceeds from the sale of property properly belong to Bulldog.[5] We disagree with Bulldog's second position mortgage lien argument for at least the reason that it fails to account for the "formal requisites" of the statute of frauds. *See* WIS. STAT. §§ 706.001(1), 706.02(1)(e) (transactions involving land interests valid only if "evidenced by a conveyance" that "[i]s signed by or on behalf of all parties").

¶33 As the circuit court noted, the disputed August 2013 recorded mortgage to Bulldog stated that it was a mortgage from the only named grantor, Outer Limits, and contains only one grantor signature, "Shawn Brunner/Outer Limits Investments." Shawn is not identified as a mortgagor, and he did not personally sign the mortgage on his own behalf or in any capacity except on behalf of Outer Limits. Thus, under the statute of frauds this mortgage gave no rights to Bulldog in any of the Shawn Properties—to a second position mortgage lien or

[5] At oral argument, Bulldog did not present a clear explanation as to how, if we were to reverse and remand based on this issue, a fact finder would determine what, if anything, Bulldog is entitled to in the way of proceeds from the sale of property.

any other position. *See* ***Nelson v. Albrechtson***, 93 Wis. 2d 552, 556, 560-61, 287 N.W.2d 811 (1980) ("The obvious purpose of requiring the signature of the grantor to appear on the conveyance is to evidence his [or her] intent to become bound by the agreement.") (citing 7 Thompson, *Real Property*, sec. 3220, p. 405 (1962)).

¶34 In its principal brief on appeal, Bulldog points to the fact that the mortgage was signed by "Shawn A. Brunner/Outer Limits Investments," and, without developing an argument, apparently means to suggest that this signature conveys that Shawn was signing personally as to the Shawn Properties. However, the signature clearly conveys that Shawn signed on behalf of Outer Limits as to its properties, not on his own behalf as to his properties.

¶35 Also in its principal brief on appeal, Bulldog flatly asserts, without additional explanation, that Securant's position "ignores that Todd Brunner and Debra Kraemer state that the transaction was intended to grant Bulldog a mortgage on the Shawn Brunner Properties" and that "it ignores that the note signed by Shawn Brunner dated July 26, 2016 states that it is secured by" parcels that include the Shawn Properties. These assertions referencing later events do not constitute a developed legal argument. For one thing, Bulldog does not attempt to come to grips with the well established Wisconsin rule that "[w]here the terms of a contract are clear and unambiguous, we construe the contract according to its literal terms. 'We presume the parties' intent is evidenced by the words they [choose], if those words are unambiguous.'" *See* ***Tufail v. Midwest Hosp., LLC***, 2013 WI 62, ¶26, 348 Wis. 2d 631, 833 N.W.2d 586 (citation omitted) (quoting ***Kernz v. J. L. French Corp.***, 2003 WI App 140, ¶9, 266 Wis. 2d 124, 667 N.W.2d 751).

¶36 For the first time in its reply brief on appeal, Bulldog makes a generalized argument referencing WIS. STAT. § 706.04, which contains the "equitable relief" provisions that potentially limit application of the statute of frauds. However, for three reasons we reject Bulldog's argument for a second position mortgage lien based on § 706.04.

¶37 First, Securant persuades us, in a letter brief submitted after oral argument, that Bulldog failed to present the circuit court with a sufficiently clear argument based on one or more subsections of WIS. STAT. § 706.04 and also persuades us that application of the forfeiture rule is warranted here. *See* ***State v. Reese***, 2014 WI App 27, ¶14 n.2, 353 Wis. 2d 266, 844 N.W.2d 396 ("This court need not address arguments that are raised for the first time on appeal."). We conclude that it would improperly blindside the circuit court to reverse based on a legal argument that Bulldog never squarely presented to it. This case was extensively litigated before two circuit court judges. Bulldog, represented by legal counsel, had ample opportunities to make a clear legal argument based on one or more identified subsections of § 706.04. The letter briefs demonstrate that it failed to do so.

¶38 Second, this equitable relief argument is raised for the first time on appeal in Bulldog's reply brief. We do not typically consider arguments made for the first time in a reply brief. *See* ***Reese***, 353 Wis. 2d 266, ¶14 n.2. And, nothing argued by Bulldog at oral argument or in its briefing suggests a good reason not to apply this general rule here.

¶39 Third, this equitable relief argument is cast in general terms and is not well developed. Bulldog asserts that "Securant fails to consider all aspects of the statute of frauds," which does not clearly explain how the circuit court here

improperly failed to apply a particular subsection of WIS. STAT. § 706.04. And, again, we did not hear at oral argument a persuasive case that a particular subsection of § 706.04 should have been applied here.

¶40 For these reasons, we reject Bulldog's argument that the disputed August 2013 recorded mortgage established a second position mortgage lien.

By the Court.—Judgment affirmed.

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