COURT OF APPEALS
DECISION
DATED AND FILED

January 17, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2016AP1097 **Cir. Ct. No. 2010CV1432**

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

UMB BANK, N.A.,

PLAINTIFF-RESPONDENT,

U.S. BANK NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE FOR THE RMAC TRUST, SERIES 2016-CTT,

INTERVENOR-RESPONDENT,

V.

DAVID T. WHITEHEAD AND TERRI J. WHITEHEAD,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

V.

JPMORGAN CHASE BANK, N.A.,

THIRD-PARTY DEFENDANT.

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

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. David and Terri Whitehead appeal a judgment of foreclosure granted in favor of UMB Bank, N.A.[1] They contend that UMB was without standing to pursue foreclosure, failed to adequately mitigate its damages, and came seeking relief with unclean hands. We affirm.

¶2 In 2007, the Whiteheads executed a $690,000 residential mortgage loan with Washington Mutual Bank, F.A. In 2009, they defaulted on the loan. In 2010, JPMorgan Chase Bank, N.A., which had acquired Washington Mutual's servicing business in 2008, filed suit against the Whiteheads. The complaint alleged that Chase was the lawful holder of the note and mortgage and attached as an exhibit a copy of an unendorsed note payable to Washington Mutual. In 2013, servicing of the loan was transferred to BSI Financial Services.

¶3 The pace picked up in 2015. In March, the parties stipulated to substituting U.S. Bank National Association, not in its individual capacity but

[1] This court granted the petition of U.S. Bank National Association, not in its individual capacity, but solely as Trustee for the RMAC Trust, Series 2016-CTT, to intervene as it once again owns the note and mortgage by virtue of an assignment from UMB. We concluded that adding U.S. Bank as intervenor-respondent did not affect the issues on appeal or the content of the parties' briefs. We accepted U.S. Bank's brief and construed assertions U.S. Bank made in motions to this court that plaintiff-respondent UMB intended not to file a respondent's brief and to join in intervenor-respondent U.S. Bank's brief.

solely as legal title trustee for LVS Title, Trust I, as plaintiff; in July, U.S. Bank moved for partial summary judgment to bar the Whiteheads' affirmative defenses, among them, standing, failure to mitigate damages, and unclean hands; and in August, U.S. Bank transferred ownership of the note to UMB and amended its summary judgment motion to correct the name of the loan owner to UMB. At a hearing in September, the court found that the standing issue presented a disputed issue of material fact and denied UMB's motion for summary judgment and also declined to dismiss the case. The court subsequently ordered that UMB be substituted as plaintiff as the real party in interest.

¶4 At trial, UMB produced a copy of the note, this one endorsed in blank, making it payable to bearer and negotiable by transfer of possession alone until specially endorsed. *See* WIS. STAT. § 403.205(2) (2015-16).[2] Testifying for UMB, BSI foreclosure specialist Michael Paterno testified that: servicing of the loan transferred from Chase to BSI in July 2013; when BSI begins servicing a loan, it obtains the original note and mortgage and keeps them in its Titusville, Pennsylvania vault; BSI was in possession of the original note on behalf of UMB; he serviced the loan on behalf of both U.S. Bank and UMB; the note he presented in court containing an endorsement in blank was the original; and, based on BSI's electronic records, the note contained an endorsement in blank at the time servicing transferred from Chase to BSI. At the close of UMB's case, the Whiteheads moved for a directed verdict, again asserting a lack of standing. The court denied the motion.

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

¶5 At trial's end, the court found that: UMB proved it was the holder of the note and thus had standing to pursue foreclosure; none of the conduct of any of the series of banks or their servicers constituted unclean hands; the judgment should be reduced by $24,000 [the amount of the trial payments the Whiteheads expended in their attempt to modify their loan] because, by delaying prosecution of the foreclosure, Chase had failed to fully mitigate its damages, which conduct subsequent banks assumed on acquiring the loan; and UMB was entitled to judgment of foreclosure. This appeal followed.[3]

¶6 The Whiteheads again challenge UMB's standing to pursue foreclosure. Standing presents a question of law for our de novo review. ***Chenequa Land Conservancy, Inc. v. Village of Hartland***, 2004 WI App 144, ¶12, 275 Wis. 2d 533, 685 N.W.2d 573.

¶7 The Whiteheads argue at length that UMB failed to demonstrate on summary judgment that it had standing to enforce the note. We disagree. U.S. Bank held the original note, endorsed in blank when it filed the summary judgment motion. A party in possession of a note endorsed in blank is a holder entitled to enforce it. *See* WIS. STAT. § 403.205(2) (stating that instrument endorsed in blank is payable to bearer); § 401.201(2)(km)l. (defining "holder" as person in possession of negotiable instrument payable to bearer); and § 403.301

[3] UMB moved to dismiss the appeal on grounds that the Whiteheads' untimely notice of appeal deprived this court of subject matter jurisdiction. *See* WIS. STAT. RULE 809.10(1)(e); ***State v. Sorenson***, 2000 WI 43, ¶16, 234 Wis. 2d 648, 611 N.W.2d 240. This court denied UMB's motion. UMB renews the jurisdictional argument here. Assuming without deciding that the appeal was timely filed, the procedural status of the appeal is of no consequence. The Whiteheads' arguments fail on the merits.

(stating that "holder" is entitled to enforce instrument). The court then ordered that UMB be substituted as plaintiff as party in interest. In any event, the argument is somewhat beside the point, as the trial court denied U.S. Bank/UMB's summary judgment motion.

¶8 The Whiteheads also contend there was no proof that U.S. Bank authorized UMB to continue the action in U.S. Bank's stead, such that the trial court should have granted their motion to dismiss. Again we disagree. "In case of any transfer of interest, the action may be continued by or against the original party unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." WIS. STAT. § 803.10(3). The statute is worded permissively, connoting an exercise of discretion.

¶9 Noting that the Whiteheads could have filed a motion requesting that UMB step aside, but did not, the trial court construed the Whiteheads' argument as an oral motion for UMB to be substituted in as the real party in interest. *See* WIS. STAT. § 803.01(1). Implicitly recognizing the case's protracted history and the high stakes for both sides, the court further observed that foreclosure operates in equity and that it would be inequitable to dismiss the action. The court properly exercised its discretion.

¶10 The Whiteheads next assert that UMB failed to prove that the note produced at trial was enforceable as, unlike the "complaint note," it was endorsed in blank. An instrument endorsed in blank becomes payable to the bearer. WIS. STAT. § 403.205(2); ***PNC Bank, N.A. v. Bierbrauer***, 2013 WI App 11, ¶12, 346 Wis. 2d 1, 827 N.W.2d 124 (2012). To foreclose on a promissory note secured by a mortgage, a lender must be entitled to enforce the note by proving that the lender

is (1) a holder[4] of the instrument, (2) a nonholder in possession of the note who has the rights of a holder, or (3) a person not in possession of the instrument but who is entitled to enforce the instrument pursuant to WIS. STAT. §§ 403.309 or 403.418(4). WIS. STAT. § 403.301.

¶11 The Whiteheads contend the unendorsed copy of the note attached to the complaint is admissible evidence that UMB was not the holder of the note. Attaching it to the complaint, they assert, made it a judicial admission, which should have prevented UMB from later relying on the note endorsed in blank.

¶12 A judicial admission is an express waiver, made in court by a party or a party's attorney, conceding for the purposes of trial the truth of some alleged fact. *See* ***Fletcher v. Eagle River Mem'l Hosp., Inc.***, 156 Wis. 2d 165, 175, 456 N.W.2d 788 (1990). Determining whether a party or a party's attorney has made a binding judicial admission is committed to the trial court's sound discretion. *See* ***Olson v. Darlington Mut. Ins. Co.***, 2009 WI App 122, ¶5, 321 Wis. 2d 125, 772 N.W.2d 718. We review discretionary decisions under the deferential erroneous exercise of discretion standard. ***Id.***

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[4] A "holder" means any of the following:

> 1. The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.
>
> 2. A person in possession of a document of title if the goods are deliverable either to bearer or to the order of the person in possession.
>
> 3. A person in control of a negotiable electronic document of title.

WIS. STAT. § 401.201(2)(km).

¶13 Here, the complaint does not allege that the copy of the note attached to it was a true and correct copy of the original note as it existed at that time. It alleges only that the Whiteheads executed a note and mortgage, "copies of which are annexed hereto as Exhibit 1 and Exhibit 2, respectively, and by reference made a part hereof." It made "perfect sense" to the court that an endorsement would not necessarily be on the complaint note "because it was payable to Washington Mutual, and the only time they would have to endorse it in blank is at the time of any future transfer. The complaint merely says what was done at the time of the execution by the Whiteheads; that's the note that's attached." Although the court made that statement in the context of its ruling on the Whiteheads' motion for a directed verdict, we conclude the same logic supports its determination to not treat the "complaint note" as a judicial admission. *See* ***Olivarez v. Unitrin Prop. & Cas. Ins. Co.***, 2006 WI App 189, ¶17, 296 Wis. 2d 337, 723 N.W.2d 131 ("Because the exercise of discretion is so essential to a circuit court's functioning, we will search the record for reasons to sustain its exercise of discretion.").

¶14 The Whiteheads also contend UMB failed to prove that Chase had the right to enforce the note when it filed the complaint, and question the authenticity of the note endorsement executed by Washington Mutual Vice President Cynthia Riley. The Whiteheads offer no proof, but hazard a guess, that the endorsement in blank "was placed on the note not by anyone at Washington Mutual … but by HUD after JPMorgan Chase either mistakenly or fraudulently enrolled the note in the [Distressed Asset Stabilization Program]."

¶15 Signatures on a note and the authority to make them are "presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer ...." WIS. STAT. § 403.308(1). "'Presumption' or 'presumed' means that the trier of fact must find the existence of the fact presumed unless and

until evidence is introduced which would support a finding of its nonexistence." WIS. STAT. § 401.201(2)(pm). This is not an action to enforce Riley's or Washington Mutual's liability. The authenticity of the endorsement thus must be presumed. The Whiteheads have not submitted any affirmative evidence to rebut the presumption.

¶16 In sum, a note endorsed in blank is payable to the bearer and is negotiated by transfer of possession alone. *See* WIS. STAT. §§ 403.201(1), 403.205(2). The note admitted at trial was endorsed in blank. UMB is the bearer of the note. UMB has standing to enforce it.

¶17 Seeking to prove their affirmative defenses of damage mitigation and unclean hands, the Whiteheads asked foreclosure specialist Paterno on cross-examination how much UMB paid to acquire the loan. UMB objected. Paterno declined to answer. The court sustained the objection.

¶18 "Foreclosure proceedings are equitable in nature, and the circuit court has the equitable authority to exercise discretion throughout the proceedings." ***GMAC Mortg. Corp. v. Gisvold***, 215 Wis. 2d 459, 480, 572 N.W.2d 466 (1998). A trial court's decision to admit or exclude evidence also is a discretionary determination. ***Nischke v. Farmers & Merchants Bank & Trust***, 187 Wis. 2d 96, 105, 522 N.W.2d 542 (Ct. App. 1994).

¶19 In 2013, BSI advised the Whiteheads that the unpaid principal was $989,000 and calculated a new loan modifîcation for them that temporarily set payments at $4,000 a month. The Whiteheads pointed out to BSI that by that time the property was worth only $400,000.

¶20 At trial, when they tried to learn from Paterno what UMB had paid for the loan, the Whiteheads argued that UMB's alleged efforts through BSI to modify the loan were based on a sum much higher than UMB's actual investment into the loan, such that they believed it fair and relevant to the relief sought to know how much UMB was "actually out of pocket." UMB responded that, even through the lens of equity, there was "no necessary correlation" between what someone might pay for a particular asset in foreclosure and its actual value.

¶21 The court also did not believe the evidence was "of any import" because, the court said, it was unsure "what the value of this is in the marketplace as opposed to the remedies here." The court told the Whiteheads that if they were to "present expert testimony regarding this or to show how it relates, I might listen, but just asking him [Paterno] what it is and then telling me that number means something, doesn't make sense to me."

¶22 The Whiteheads concede that UMB was not obliged to forgive principal or to reduce the amount of the loan to what it had paid or what the property was worth and, in fact, that "UMB had every legal right to insist that it be paid the face value of the note." The question, they assert, is not what is required but what is reasonable, and one aspect of whether UMB's modification offer was reasonable was how much UMB had invested in the first place.

¶23 We see it as the trial court did. What UMB paid for the note is not relevant to whether the Whiteheads defaulted. And as the trial court suggested, a raw figure from a non-expert is essentially a number in a vacuum. We therefore must uphold the court's discretionary determination, as it has a reasonable basis and was made in accordance with the facts of record. *See* ***id.***

¶24 The Whiteheads also contend UMB[5] has "unclean hands" because its persistent dilatory conduct caused the modification application process through the Home Affordable Modification Program (HAMP)[6] to needlessly drag on for over six years. "[A] plaintiff who seeks affirmative equitable relief must have 'clean hands' before the court will entertain his plea." ***S & M Rotogravure Serv. v. Baer***, 77 Wis. 2d 454, 466, 252 N.W.2d 913 (1977). An unclean-hands defense implies "substantial misconduct constituting fraud, injustice or unfairness." ***Id.*** For relief to be denied under the doctrine, "it must clearly appear" that the plaintiff's claimed damages "are the fruit of its own wrongful or unlawful course of conduct." ***Id.*** at 467.

¶25 The Whiteheads contend, among other things, that UMB failed to comply with HAMP regulations, kept encouraging the Whiteheads to reapply, repeatedly asked the Whiteheads for additional information, some identical to that already submitted, and presented a changing cast of lawyers, loan servicers, and contacts at the banks. They also claim the lender gave misleading advice that prompted them to move from their home in Illinois and to start missing payments.[7]

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[5] "UMB" in this context includes its predecessors-in-interest and their servicers.

[6] The parties and the trial court referred to both "HAMP" and "Making Homes Affordable," sometimes interchangeably. HAMP was a component of the latter. As any distinction does not matter for the discussion here, we will use the easier "HAMP."

[7] Terri testified that when they began the loan modification process, they had missed no payments and resided in Illinois, as the Walworth County house still was under construction. She said the lender told them that to be eligible for HAMP, the home for which loan modification was sought must be the applicants' primary residence and they could not be current on their payments.

The trial court made two specific findings: (1) the Whiteheads were not advised, we'll call it, to "move and miss," but simply were told they were not eligible for HAMP because the new home was not their primary residence and they were not behind on their payments, and (2) the Whiteheads decided on their own to use that information to find a way to qualify.

When approved for a modification in 2009, they declined it, saying their financial picture had changed and they could not afford the modified payments. The Whiteheads deny ever receiving two subsequent permanent modification proposals that Chase said it sent to them in March and July 2010. In August they reapplied; in September, Chase filed the foreclosure action.

¶26 The court found that both parties' hands were unclean, thus barring the Whiteheads' reliance on that defense. The banks "treated [the] Whitehead[s] poorly." For their part, the Whiteheads did not tell the banks that Terri's income fell because of their own decision to build, possibly for investment, a second home and to voluntarily move from Illinois to Delavan where Terri had no client base, but instead blamed their financial straits solely on the 2008 downturn in the economy. The court found this representation to the banks "not the whole truth" and "misleading." Terri also did not readily supply proper proof of her income from her interior design business. The court found that Terri's testimony lacked credibility but that it did not doubt the bank's.

¶27 The court concluded that on balance the equities favored the bank. It reasoned that HAMP was "not designed for people whose income is approaching $400,000" and who listed the home at $890,000 when they tried to sell it. It found that the Whiteheads were not "unsophisticated homeowners doing their best" to save the family home, nor were they in "true financial distress like [it] believe[d] the program is intended for," but simply had "stretched themselves thin." It also found it relevant that they missed mortgage payments and sent in nonsufficient checks. These findings are not clearly erroneous. It cannot be said that UMB's claimed damages were due to its, or its predecessors, wrongful or unlawful conduct such that the Whiteheads should prevail.

¶28 We also note that the Whiteheads make much of the claimed HAMP violations. In our view, HAMP has no contractual relevance to the Whiteheads' note. In 2009, they declined the modification offered, defaulted on the loan, and have not made a payment since. That is why the foreclosure action was brought, not because of any alleged HAMP violations by UMB, its predecessors-in-interest, or the servicers. If HAMP violations were so critical to this case, it is curious that the guidelines were not produced at trial. The trial court did not erroneously exercise its discretion in rejecting their unclean-hands defense.

¶29 The Whiteheads also argue that UMB failed to mitigate its damages by prolonging the foreclosure action. The party alleging breach of contract has a duty to mitigate damages, that is, to use reasonable means under the circumstances to avoid or minimize the damages. ***Kuhlman, Inc. v. G. Heileman Brewing Co.***, 83 Wis. 2d 749, 752, 266 N.W.2d 382 (1978). The injured party cannot recover any item of damage that could have been avoided. ***Id.*** Whether a party fails to mitigate damages is a question of fact. *See* ***Garceau v. Bunnell***, 148 Wis. 2d 146, 155, 434 N.W.2d 794 (Ct. App. 1988). We review a question of fact under the "clearly erroneous" standard. WIS. STAT. § 805.17(2).

¶30 The trial court agreed with the Whiteheads. It found that UMB—by its predecessor-in-interest Chase—failed to mitigate its damages to the extent that it delayed the prosecution of the foreclosure:

> I'm also finding that the bank's failure to mitigate resulted in the Whiteheads making payments totaling $24,000, which had they been—if the foreclosure had gone through without the constant back and forth, that they would not have made those. I concede that otherwise the interest is offset by their ability to stay there. But that specific $24,000 that, frankly, the bank did not introduce evidence as to where it went and how it was applied, does go to mitigation of damages; and I will reduce the amount owed on the home by that much.

¶31 These findings are not clearly erroneous. As with the unclean-hands defense, we conclude that the amount for which another bank agreed to sell the loan to UMB likewise is irrelevant to the mitigation-of-damages defense.

By the Court.—Judgment affirmed.

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