COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2016AP2292 **Cir. Ct. No. 2015CV006810**

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

WELLS FARGO BANK, NA,

PLAINTIFF-RESPONDENT,

V.

LISA LYNN JACOBSON,

DEFENDANT-APPELLANT,

ROBIN R. JACOBSON A/K/A ROBIN ROBERT JACOBSON AND UNIVERSITY OF WISCONSIN CREDIT UNION,

DEFENDANTS.

APPEAL from a judgment of the trial court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Kessler, Brash and Dugan, J.J.

¶1 PER CURIAM. Lisa Jacobson (Lisa)[1] appeals a judgment of foreclosure in favor of Wells Fargo Bank, N.A., involving property located at 1917 South 71st Street, West Allis, Wisconsin. (the "subject property"). On appeal, Lisa argues that material issues of fact exist surrounding the validity of the note in question and, therefore, the trial court erred when it granted summary judgment in favor of Wells Fargo. She also argues that the trial court erroneously exercised its discretion[2] in granting the equitable remedy of foreclosure to Wells Fargo.

¶2 We agree with the trial court and hold that there are no material issues of fact regarding the note's validity. We further conclude that the trial court properly exercised its discretion in granting the judgment of foreclosure to Wells Fargo. Therefore, we affirm the trial court's decision.

BACKGROUND

¶3 In March 1999, Lisa and Robin wed. In late November 2011, without Lisa's knowledge Robin applied for a mortgage loan from a mortgage broker, Commonwealth Mortgage LLC, to purchase the subject property. Robin

[1] Lisa Jacobson and Robin Jacobson, who were formerly married, have the same surname. For purposes of clarity in this decision, we refer to them individually by given name, and collectively as the "Jacobsons."

University of Wisconsin Credit Union is also named as a defendant. However, the credit union is not relevant to this decision and, therefore, is not further mentioned in this decision.

[2] Lisa actually asserts that the trial court's order was an "abuse of its discretion." However, our supreme court's 1992 ***City of Brookfield v. Milwaukee Metropolitan Sewerage District*** decision directs that the term "erroneous exercise of discretion" should be used in order to dispense with "unjustified negative connotations" associated with the term "abuse of discretion." *See* ***id.***, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992). As our supreme court explained the standard of review is unchanged; it is simply a change in "the locution." *See* ***id.*** Thus, throughout this opinion, we have used the term "erroneous exercise of discretion."

completed a loan application indicating that he was not married, which was untrue, and he also represented that his financial situation was better than it was. Robin's loan application was approved. In late December 2011, Robin signed a note with the lender, Bank of Montreal-Harris N.A. (BMO), secured by a mortgage on the subject property given by Robin as a "single person."

¶4 Lisa, who was still married to Robin, did not know that he intended to purchase the subject property or that Robin had applied for the loan. She did not sign any loan application or loan documents.

¶5 As of late January 2012, Wells Fargo became the holder of the original note and mortgage on the subject property. Subsequently, in late August 2012, Robin executed a quit claim deed transferring his sole interest in the subject property to himself and Lisa. The quit claim deed, signed by both Lisa and Robin, states that it was drafted by "Lisa Lynn Jacobson."

¶6 The record is not developed in this respect but it appears that, prior to December 2013, Lisa and the Jacobsons' daughter lived in a house in Wauwatosa. In December 2013, the Wauwatosa house went into foreclosure because Lisa could no longer afford to live there. So, Lisa and the Jacobsons' daughter moved into the subject property.

¶7 On April 1, 2014, Lisa filed a petition for divorce against Robin (the "divorce action"). In April 2014, Lisa also paid Wells Fargo over $11,500 to reinstate the loan and have a foreclosure action against the subject property vacated. Lisa continued to make monthly mortgage payments through September or October 2014. Lisa stopped making the payments because she realized that her credit reports were not improving based on those payments because neither the

mortgage nor the note were in her name. Wells Fargo filed the instant foreclosure action against Lisa and Robin on August 8, 2015.

¶8 Less than two weeks later, on August 20, 2015, the Jacobsons' divorce was finalized. The parties filed a marital settlement agreement and appeared for a final hearing. The findings of facts, conclusions of law, and judgment of divorce (filed on September 17, 2015) declared that the Jacobsons' marriage ended "effective immediately on August 20, 2015." The divorce action "conclusions of law and judgment" also stated in pertinent part as follows:

> 8. **Court Order.** The court entered the following order:
>
> A. [Lisa] is awarded the [subject property]. [*Lisa*] *shall be responsible for the mortgage, taxes, and all other debts related to the homestead*, including maintenance and upkeep.
>
> B. [*Lisa*] *shall have until August 20, 2016, to refinance the mortgage to remove* [*Robin*] *from it.* In the event that [*Lisa*] is unable to refinance the mortgage to remove [Robin] from it on or before August 20, 2016, the house shall be listed for sale to satisfy the mortgage.

(Emphasis added.) Wells Fargo was not a party to the divorce action.

¶9 In early September 2015, Robin filed a *pro se* answer in the foreclosure action. On September 22, 2015, Lisa filed an answer and counterclaim in the foreclosure action, raising the following defenses: (1) failure to state a claim; (2) laches, waiver or estoppel; (3) unclean hands; and (4) failure of a condition subsequent or precedent. Her answer did not deny that Wells Fargo is the holder of the subject note and mortgage and did not challenge the validity of the note and mortgage.

¶10 The trial court set Wells Fargo's foreclosure action for a November 23, 2015 scheduling conference. Neither Lisa nor Robin appeared at the conference. The trial court dismissed Lisa's counterclaim and set the matter for a January 11, 2016 hearing on Wells Fargo's motion for default judgment. Lisa did not appeal the decision.[3] At the January 2016 default judgment hearing, Robin did not appear and, therefore, the trial court granted default judgment as to him. However, Lisa appeared and the trial court denied the default judgment motion as to her.

¶11 Thereafter, on June 29, 2016, Wells Fargo filed a motion for summary judgment with supporting affidavits. Wells Fargo's moving papers demonstrate (1) it is the holder of the subject note and mortgage, (2) there was a default in payments on the note, (3) the amount of the default and the amount due and owing, and (4) Wells Fargo provided the required notice of the default. Wells Fargo also demonstrated that as of June 20, 2016, the amount due on the loan was $101,236.75.

¶12 Lisa did not dispute the above facts in her response to the summary judgment motion. Rather, she raised two new defenses (1) as a non-signing spouse, the mortgage was not enforceable against her, and (2) the note and mortgage were invalid pursuant to 15 U.S.C. § 1639c, the ability to pay provision

[3] The Honorable John J. DiMotto presided over the scheduling conference, the motion for default judgment and granted the dismissal of Lisa's counterclaim. The Honorable Rebecca F. Dallet presided over the motion for summary judgment and granted the judgment of foreclosure. We refer to the judges collectively as the trial court.

of the Dodd-Frank Act.[4] With respect to the ability to pay provision, Lisa argued that if the originating lender, BMO, had considered Robin and Lisa's "joint debt-to-income ratio," Robin would not have qualified for the loan used to purchase the subject property. Lisa did not submit any admissible evidence to support this argument.

¶13 In response, Wells Fargo asserted that (1) Lisa forfeited the newly-raised defenses by failing to plead them in her answer and affirmative defenses;[5] (2) Lisa was not required to sign the mortgage, pursuant to WIS. STAT. § 706.02(1)(f)(2015-16),[6] because the mortgage is a purchase money mortgage; (3) Lisa relied on the ability to pay provision, but the provision was not effective until long after BMO had accepted Robin's loan application; (4) Lisa did not present admissible evidence that BMO failed to consider the factors she had identified in her response; (5) Lisa did not present admissible evidence of the Jacobsons' joint debt-to-income ratio at the time Robin applied for the loan; (6) Lisa did not present admissible evidence of the threshold debt-to-loan ratio that

[4] Lisa apparently refers to the ability to pay provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1411, 124 Stat. 1376 (2010), amending the Truth in Lending Act, to provide that a consumer may assert a violation if a mortgage originator has not made a reasonable and good-faith determination at origination that the consumer can repay the loan based on the consumer's credit history, current income, expected income, current obligations, debt-to-income ratio and other factors. *See* ***Soto v. First Guar. Mortg. Corp.***, No. 4:15-CV-00725, 2016 WL 7167978, at *4 (E.D. Tex. Nov. 2, 2016).

[5] We have substituted "forfeited" for "waived," the term used by Wells Fargo. The Wisconsin Supreme Court has explained that there is a distinction between forfeiture and waiver. *See* ***In re Ambac Assur. Corp.***, 2012 WI 22, ¶8 n.10, 339 Wis. 2d 48, 810 N.W.2d 450. An issue is "waived" when a party "affirmatively and deliberately relinquish[es] a right." ***Id.*** In contrast, "forfeiture" occurs when a party "fail[s] to raise and preserve an issue before the circuit court." ***Id.*** In the context Wells Fargo raises the concern, it is appropriate to refer to the ability to pay provision issue as forfeited by Lisa.

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

would have disqualified Robin from receiving the loan; and (7) Lisa did not present admissible evidence that the Jacobsons' joint debt-to-loan ratio did not satisfy BMO's underwriting guidelines.

¶14 At the September 2, 2016 summary judgment hearing, Lisa raised another new defense asserting that, on equitable grounds, foreclosure was not appropriate because she did not have an opportunity to refinance the loan by August 2016, as anticipated by the divorce decree. In essence, she argued that the divorce decree prevented Wells Fargo from pursuing the foreclosure action because it interfered with the divorce decree provision which envisioned that Lisa would have an opportunity to refinance the loan.[7] Lisa also told the trial court that she stopped making payments on the loan when she actually saw the loan documents and learned that she would never get credit for the loan payments on her credit report because her name was not on the loan documents. She also agreed that there had been no payments on the note since October 2014.

¶15 At the conclusion of the hearing, the trial court found that there were no disputed material facts as to whether Wells Fargo was the holder of the note and mortgage, the note and mortgage were in default, or the amount owed as a result of the default. The trial court also found that the equities did not support Lisa's equitable argument because (1) Lisa was aware of the note and mortgage when she took title to the subject property as a part of the divorce action; (2) Lisa stopped making payments on the note because she felt she was not getting credit for the payments on her credit report, however, that is not a valid reason to stop mortgage payments; and (3) as of the date that Wells Fargo filed the foreclosure

[7] As previously stated, Wells Fargo was not a party to that divorce proceeding.

action, Lisa had lived in the subject property for nearly a year without making payments. The trial court did not address the ability to pay provision. Rather, it concluded that the divorce judgment awarded Lisa the subject property, she was responsible for it, the property came with a mortgage lien, and Lisa had not made any payments on the loan since September or October 2014.

¶16 The trial court granted Wells Fargo's motion for summary judgment. The order provided in part that no deficiency judgment could be obtained against Lisa or Robin and that Lisa remained entitled to possession of the subject property to the date of the confirmation sale in this case. The trial court entered an order for judgment of foreclosure and on October 10, 2016 judgment of foreclosure was entered. This appeal followed.

STANDARD OF REVIEW

¶17 We review a grant of summary judgment by using the same standards the trial court applied in making its initial determination. *See* ***Verdoljak v. Mosinee Paper Corp.***, 200 Wis. 2d 624, 630, 547 N.W.2d 602 (1996). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). Where no material facts remain in dispute, this court determines which, if any, party is entitled to judgment as a matter of law. *See* ***Doyle v. Engelke***, 219 Wis. 2d 277, 283, 580 N.W.2d 245 (1998). We review these issues *de novo*, without deference to the trial court's decision. *See* ***Lucas v. Godfrey***, 161 Wis. 2d 51, 56, 467 N.W.2d 180 (Ct. App. 1991).

DISCUSSION

The Note is Properly Enforceable

¶18 Lisa does not dispute that Wells Fargo established the following: (1) it is the holder of the subject note and mortgage; (2) there was a default in payments on the note; (3) the amount of the default and the amount due and owing; and (4) Wells Fargo provided the required notice of the default. Rather, she argues that the note and mortgage are invalid based upon a violation of the ability to repay provision of the Dodd-Frank Act codified at 15 U.S.C. § 1639c, as a part of the Truth in Lending Act, which she asserts may be raised as a foreclosure defense by a borrower against a lender. She also argues that the note is not valid because she did not know that Robin obtained it and she did not sign it. However, Lisa has not established that the trial court erred as a matter of law.

¶19 First, Lisa concedes that the ability to repay provision did not become effective until January 10, 2014. Because the law was not effective until January 10, 2014, it had no application to the note and mortgage dated December 28, 2011, between Robin and Wells Fargo. Lisa simply states that the law was passed in 2010, however, she provides no argument regarding that fact. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (stating that we do not develop a party's arguments because "[w]e cannot serve as both advocate and judge.").

¶20 Secondly, Lisa did not raise the Dodd-Frank Act or any provision of that Act as a defense in her answer. This court has stated that "affirmative defenses are deemed waived if not raised in the pleadings." ***Oetzman v. Ahrens***, 145 Wis. 2d 560, 571, 427 N.W.2d 421 (Ct. App. 1988). Thus, regardless of whether or not the defense could be raised by a person in Lisa's position (and

more properly stated),[8] by failing to raise the affirmative defense in her answer Lisa forfeited the defense. *See* ***In re Ambac Assur. Corp.***, 2012 WI 22, ¶8 n.10, 339 Wis. 2d 48, 810 N.W.2d 450.

¶21 In addition, the mortgage is valid regardless of the fact that Lisa was not aware of mortgage at the time Robin entered into it. Wells Fargo argues that, although WIS. STAT. § 706.02(1) generally requires that each spouse must sign a mortgage, the following exception applies to a purchase money mortgage:

> Transactions under WIS. STAT. § 706.001(1) shall not be valid unless evidenced by a conveyance that satisfies all of the following:
>
> ….
>
> (f) Is signed, or joined in by separate conveyance, by or on behalf of each spouse, if the conveyance alienates any interest of a married person in a homestead under WIS. STAT. § 706.01(7) except conveyances between spouses, *but on a purchase money mortgage pledging that property as security only the purchaser need sign the mortgage*;

Sec. 706.02(1)(f) (emphasis added). Lisa does not refute this argument and therefore concedes it. *See* ***United Co-op. v. Frontier FS Co-op.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (stating that the failure to refute a proposition asserted in a response brief may be taken as a concession). Based on the foregoing analysis, we hold that the note and mortgage were valid and Wells Fargo was entitled to summary judgment on its motion for foreclosure.

[8] We note that Lisa argues that, "[a] violation of the 'ability to repay' standard may be raised as a foreclosure defense by *a borrower* against a lender." (Emphasis added.) However, with respect to the subject property, the record establishes that she is not a *borrower*. Lisa did not sign the note or the mortgage and she was not liable on the note, nor has Wells Fargo sought to hold her responsible for the note.

The Trial Court Properly Exercised Its Equitable Power in Granting the Foreclosure Judgment

¶22 Lisa argues that the trial court erroneously exercised its discretion in granting Wells Fargo the equitable remedy of foreclosure. As this court stated in ***Harbor Credit Union v. Samp***, "Generally, mortgage foreclosure proceedings are equitable in nature." *See* ***id.***, 2011 WI App 40, ¶19, 332 Wis. 2d 214, 796 N.W.2d 813 (citation omitted). "Therefore, at summary judgment in an equitable action, if the trial court has determined that there are no material issues of fact for trial, the court must further determine whether, in its discretion, any equitable relief should follow." ***Singer v. Jones***, 173 Wis. 2d 191, 194-95, 496 N.W.2d 156 (Ct. App. 1992).

¶23 In ***Sukala v. Heritage Mutual Insurance Co.***, the court explained that:

> A discretionary decision contemplates a process of reasoning that depends on facts that are in the record, or reasonably derived by inference from facts of record, and a conclusion based on the application of the correct legal standard. We will not reverse a discretionary determination by the trial court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision. [B]ecause the exercise of discretion is so essential to the trial court's functioning, we generally look for reasons to sustain discretionary determinations.

Id., 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W. 610 (citations, internal citations and quotation marks omitted; brackets in ***Sukala***). The record shows that the trial court exercised discretion and there is a reasonable basis for its decision.

¶24 Lisa argues that the trial court did not analyze the validity of the note in light of its improper issuance to Robin. She contends that the validity of the note fraudulently obtained by Robin is the proper factual and legal framework

within which the trial court should have made its determination regarding foreclosure. The trial court found and, we agree, that the equities do not favor Lisa.

¶25 First, we have already found that, regardless of Robin's misrepresentations, the note and mortgage are valid. Further, the trial court considered the pertinent circumstances surrounding Lisa's interest in the subject property. It considered that Lisa did not apply for, or sign, any loan application or loan document. However, it also noted that Lisa is not personally liable for any amounts due on the note and that Wells Fargo was not seeking and could not seek a personal judgment against her, which is advantageous for Lisa. It further considered the fact that Wells Fargo sought only to foreclose on its lien on the subject property arising from the mortgage, as it was entitled to do.

¶26 Lisa had an interest in the property arising from the 2012 quit claim deed. When she moved into the house in December 2013, she not only knew that there was a mortgage on the subject property, she also knew that Wells Fargo had commenced an action seeking to foreclose on that mortgage. Lisa could have simply not taken title to the property. The trial court further considered that, in April 2014, Lisa paid the arrearages on the note, had the loan reinstated and obtained dismissal of the foreclosure action. Lisa then made payments on the note until about October 2014—stopping the payments only because she did not believe that her credit report would reflect those payments.

¶27 Additionally, Lisa knew no payments had been made on the note since October 2014. Moreover, Lisa lived in the subject property through the judgment of foreclosure and remains entitled to live there until confirmation of the sheriff's sale.

¶28 In the divorce proceeding that Lisa commenced in April 2014, she requested and, ultimately, in late August 2015, obtained ownership of the subject property subject to Wells Fargo's interest. Moreover, although Lisa knew that the judgment of divorce provided that she was responsible for the mortgage, among other expenses for the property, she did not attempt to make any payments towards the Wells Fargo note.

¶29 Based on such undisputed facts, we agree with the trial court's determination that the equities do not favor Lisa, and conclude that the trial court properly exercised its discretion in granting the judgment of foreclosure to Wells Fargo.

CONCLUSION

¶30 We hold that there are no material issues of fact regarding the validity of the note and conclude that the trial court did not erroneously exercise its discretion in granting the judgment of foreclosure to Wells Fargo. Therefore, we affirm the trial court's decision.

By the Court.—Judgment affirmed.

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