COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1994 **Cir. Ct. No. 2016CV61**

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

BAY BANK, A WISCONSIN BANKING CORPORATION,

PLAINTIFF-RESPONDENT,

V.

GWEN S. CARR,

DEFENDANT-APPELLANT,

EA RESTORATION, LLC D/B/A PAUL DAVIS RESTORATION OF THE FOX VALLEY, BRIGHT SIGHT WINDOW CLEANING, LLC, FOX VALLEY SURGICAL ASSOCIATES, LTD., LP MOORADIAN CO., HEIGHTS FINANCE CORPORATION, MIKE LYSTER D/B/A MIKE LYSTER PAINTING & WALLCOVERING, GRAND LANDSCAPING, LLC, JW JOHNSON & ASSOCIATES, INC. AND DARRYL L. KILSDONK,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, 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. Gwen Carr appeals a summary judgment of foreclosure in favor of Bay Bank. She argues the circuit court erred because Bay Bank failed to make a prima facie case for foreclosure and because the record contains facts from which a reasonable factfinder could conclude Bay Bank breached its obligations under the mortgage. She also argues the court made a procedural error by refusing to consider documents she submitted after the order granting summary judgment had been entered. We affirm.

BACKGROUND

¶2 The following facts are undisputed.[1] On September 19, 2008, Carr obtained a loan from Bay Bank to purchase real property located in Appleton, Wisconsin. The note was secured by a mortgage on the premises. The loan was provided pursuant to a federal program known as "Section 184," under which the federal government may guarantee the repayment of loans issued to Native American families or tribes so as to encourage private financing. *See* 12 U.S.C. § 1715z-13a(a) (2012). The mortgage Carr executed contains a Section 184 rider that, among other things, requires a foreclosing lender to comply with the "provisions of Section 184 of the Housing and Community Development Act of 1992, as amended," as well as any regulations promulgated thereunder.

[1] Additional relevant facts, also undisputed, will be addressed in the discussion section.

¶3 Carr defaulted on the note. In 2010, Carr filed for a Chapter 13 bankruptcy, which was later converted to a Chapter 7 bankruptcy. In connection with those proceedings, Carr reaffirmed the mortgage with Bay Bank in November 2014. Carr was late in making payments under the reaffirmation agreement. Her last payment was on May 8, 2015, and the amount she paid was applied to the payment that had been due on August 1, 2014.

¶4 Bay Bank filed this foreclosure action against Carr on January 25, 2016. Carr, proceeding pro se, answered the complaint and provided a wide-ranging narrative of her circumstances under the heading "Statement and Request by Gwen Carr."[2] Carr signed the narrative, but there is no indication her statements therein were sworn.

¶5 Bay Bank filed a motion for summary judgment, supported by an affidavit from one of its vice presidents. The affidavit asserted Carr was "late with her monthly payments on a regular basis," resulting in a balance well in excess of the original loan amount.[3] The circuit court entered a scheduling order requiring Carr to submit her response brief by May 27, 2016, with a motion hearing scheduled for June 17, 2016.

¶6 On May 25, 2016, Carr requested a sixty-day extension of time to file her response to the motion and a continuance of the June 17 hearing. The circuit court granted Carr's requests over Bay Bank's objection. It entered a new

[2] Carr is represented on appeal.

[3] The original loan amount was $160,350, with a seven percent interest rate. The outstanding balance as of April 2016 was $181,333.61.

scheduling order requiring Carr to file a response brief by July 27, 2016, with a motion hearing scheduled for August 18, 2016.

¶7 Carr failed to file her response brief within the time allotted. Instead, on August 8, 2016, Carr filed a six-page letter accusing Bay Bank of having failed to comply—prior to commencing the foreclosure action—with what she represented were numerous Section 184 requirements. The letter was not in the form of an affidavit, nor is there any indication that Carr's statements were made under oath. Carr's letter was accompanied by over one hundred pages of attachments, including what appears to be a Section 184 guide for loan servicers and government-issued notices regarding Section 184 loans.

¶8 Carr appeared pro se at the August 18, 2016 hearing. The circuit court acknowledged having received a "packet of materials" from Carr, but it remarked that those materials "didn't seem to be too responsive to the Summary Judgment motion other than complaining about the Bank's failure to follow through with some details of the 184 program." Specifically, the court noted Carr did not address the fact that she had not paid the mortgage for over one year. Moreover, Carr admitted she had failed to serve Bay Bank's attorney with a copy of the August 8, 2016 letter and attachments, claiming she "didn't know [she] was supposed to do that."

¶9 Upon further questioning by the circuit court, Carr asserted Bay Bank, contrary to Section 184's requirements, had failed to provide her with an informational packet regarding how to avoid foreclosure, nor did Bay Bank, prior to commencing the foreclosure action, conduct a required face-to-face interview or make reasonable efforts to do so. Bay Bank's attorney was unprepared to respond to these assertions, given that she had not been aware of them prior to the hearing.

Under the circumstances, the court withheld granting Bay Bank's summary judgment motion, but it permitted Bay Bank to supplement its affidavit to provide "sufficient proof that they offered the face-to-face meeting and that they sent the Borrower Information Packet." Upon such proof, the court stated it would enter judgment in Bay Bank's favor.

¶10 Bay Bank submitted a supplemental affidavit stating that it had mailed correspondence to Carr on February 5, 2014, via first-class mail. This correspondence noted Carr was two months behind on her payments and encouraged her to contact the Bank at a designated telephone number. The mailing also included a list of counseling agencies and an informational brochure on avoiding foreclosure published by the United States Department of Housing and Urban Development. The affidavit stated Carr had been in frequent contact with Bay Bank between August 2014 and July 2015 regarding her delinquent payments and she had also been physically present in bank branches at various times, yet she failed to request a face-to-face meeting. Finally, Bay Bank noted Carr had filed complaints regarding its handling of her loan with the Federal Deposit Insurance Corporation and Wisconsin Department of Financial Institutions, neither of which determined Bay Bank had acted improperly. Based on the supplemental affidavit, the circuit court granted a summary judgment of foreclosure.

DISCUSSION

¶11 Underlying all of Carr's appellate arguments is the assertion that Bay Bank failed to make a prima facie case for summary judgment because its submissions failed to affirmatively show compliance with certain Section 184 requirements. Carr cites no authority for the proposition that Bay Bank's

summary judgment submissions needed to establish its compliance with these regulations in order to make a prima facie case for foreclosure.[4] Rather, even if one views such servicing regulations as benefitting the mortgagor rather than the federal government, the prevailing view appears to be that a mortgagor may raise noncompliance as an affirmative defense to foreclosure. *See* ***Bankers Life Co. v. Denton***, 458 N.E.2d 203, 205 (Ill. App. Ct. 1983); ***Lacy-McKinney v. Taylor Bean & Whitaker Mortg. Corp.***, 937 N.E.2d 853, 862-63 (Ind. Ct. App. 2010) (collecting cases and adopting ***Denton*** rule); *cf.* ***Federal Nat. Mortg. Ass'n v. Prior***, 128 Wis. 2d 182, 186, 381 N.W.2d 558 (Ct. App. 1985) (recognizing that violations of certain regulations may be a defense to foreclosure but concluding a violation of 24 C.F.R. § 203.556 regarding the acceptance of partial payments was not). It was thus incumbent upon Carr, as a defendant in this action, to properly raise the issue of Bay Bank's purported failure to follow applicable servicing regulations. In other words, Carr proceeds from the legally incorrect premise that it was Bay Bank's burden to affirmatively show compliance with Section 184 requirements.

¶12 Carr's "answer" failed to clearly identify any affirmative defenses. Contrary to her arguments on appeal, her statements in the answer that "Bay Bank had never done anything to help me" and she "never received any correspondence from Bay Bank about the status of [her] mortgage" were insufficient to put Bay Bank on notice that she was raising noncompliance with any particular

[4] Carr argues Bay Bank is prohibited from initiating a foreclosure until all requirements of Subpart C of Title 24, Part 203 have been met. *See* 24 C.F.R. § 203.606(a). Even if that is true, such a rule does not mean Bay Bank is required, for purposes of summary judgment, to establish compliance with all such requirements to sustain a prima facie case. The latter does not necessarily follow from the former and, as stated, Carr cites no authority for the latter conclusion.

Section 184 requirement as a defense.[5] Affirmative defenses are generally deemed waived if not raised in the pleadings. ***Oetzman v. Ahrens***, 145 Wis. 2d 560, 571, 427 N.W.2d 421 (Ct. App. 1988).

¶13 Carr's untimely response brief to Bay Bank's summary judgment motion was the first document to raise the possibility of noncompliance with Section 184 servicing requirements. However, her six-page letter brief failed to provide citations to specific regulations and sometimes framed alleged noncompliance as a question (e.g., "Did Bay Bank sen[d] HUD the retired [sic] 3 month delinquency notice that is also part of the Section 184 loan processing program?"). While courts generally accord pro se litigants a degree of leeway in complying with the rules expected of lawyers, *see* ***Rutherford v. LIRC***, 2008 WI App 66, ¶27, 309 Wis. 2d 498, 752 N.W.2d 897, a pro se litigant must nonetheless satisfy all procedural requirements, and a circuit court has no duty to walk them through the procedural requirements or to point them to the proper substantive law, *see* ***Waushara Cty. v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992).

¶14 Despite Carr's response submission being untimely, undeveloped, and lacking any sworn affidavit in support, the circuit court gave Carr an opportunity to orally state her objections to the foreclosure at the motion hearing. She raised only Bay Bank's alleged failures to provide an informational packet

[5] Carr's putative answer twice referred to a "Sect 186" program. Even construing this as a reference to Section 184, her assertions were only generic claims: first, that she was "suppose[d] to be contacted by the lender in Sect 186 programs to provide assistance and resources to avoid foreclosure"; and, second, that she "didn't know anything about [her] rights or the responsibilities of the lender in the Sect 186 program to help a struggling homeowner." Again, neither reference to "Sect 186" was sufficient to put Bay Bank on notice that Carr was raising noncompliance with any particular regulation as an affirmative defense against Bay Bank's ability to foreclose on the mortgage.

and to conduct a face-to-face interview. Although on appeal Carr raises noncompliance with numerous other servicing regulations, we deem those matters beyond the scope of our appellate review. The circuit court had discretion to waive Carr's procedural violations. *See* ***Graf***, 166 Wis. 2d at 452. It apparently did so only as to the issues Carr raised at the motion hearing. Given Carr's failure to properly raise her defenses in her pleading, her failure to make a record in the circuit court and her violation of the court's scheduling order even after being given an extension of time, we cannot conclude the court erred in so limiting the issues.

¶15 We therefore turn to the two regulations the circuit court required Bay Bank to address. The first regulation requires the lender to give notice of default "on a form supplied by the Secretary or, if the mortgagee wishes to use its own form, on a form approved by the Secretary, no later than the end of the second month of any delinquency in payments under the mortgage." 24 C.F.R. § 203.602 (2016). Carr argues Bay Bank's February 5, 2014 mailing failed to satisfy this requirement because it was on the bank's letterhead rather than on "a form approved by the Secretary." Her response brief, however, was unaccompanied by any evidentiary materials creating a factual issue regarding whether the form of Bay Bank's notice lacked the necessary agency approval.[6]

[6] Carr acknowledges the evidentiary void created by her failure to file an affidavit, but she requests that we consider her various unsworn statements as "judicial admissions" under ***Fletcher v. Eagle River Memorial Hospital, Inc.***, 156 Wis. 2d 165, 456 N.W.2d 788 (1990). For a variety of reasons, we decline to do so. Chief among these reasons is that the doctrine of judicial admissions is typically applied to allow a party to make a concession regarding the truth of an alleged fact, thereby relieving the parties of the need to address that fact at trial. *See* ***id.*** at 175. Carr has pointed to no case in which the doctrine was used offensively to thwart a summary judgment motion where the party otherwise failed to make any evidentiary submissions that would be admissible at a trial. We generally do not address arguments unsupported by citations to relevant legal authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App.

(continued)

Again, it was Carr's burden of production in this regard. *See supra* ¶11. There was no evidentiary basis in the summary judgment record from which a factfinder could reasonably conclude that Bay Bank failed to comply with 24 C.F.R. § 203.602 (2016).

¶16 Carr also asserts summary judgment was improper because a factfinder could reasonably conclude Bay Bank made no effort to conduct a face-to-face meeting. Federal law requires that the mortgagee have a face-to-face interview with the mortgagor, or "make a reasonable effort to arrange such a meeting," prior to payments becoming three months delinquent. 24 C.F.R. § 203.604(b) (2016). A "reasonable effort" to arrange such a meeting consists of, at a minimum, one letter sent to the mortgagor via certified mail and "at least one trip to see the mortgagor at the mortgaged property." 24 C.F.R. § 203.604(d) (2016).

¶17 There are exceptions to these rules. There are certain circumstances under which the mortgagee need not make a visit to the property. *See* 24 C.F.R. § 203.604(d) (2016). More importantly for our purposes, the regulation identifies five circumstances under which a face-to-face meeting is not required, including if the mortgagor has "clearly indicated that he [or she] will not cooperate in the interview." *See* 24 C.F.R. § 203.604(c)(1)-(5) (2016). Bay Bank's supplemental affidavit included various communications between Carr and bank officials dated between August 2014 and July 2015 in which Carr repeatedly promised to visit a

---

1992). Furthermore, a judicial admission must be, among other things, "clear, deliberate, and unequivocal." ***Fletcher***, 156 Wis. 2d at 174. Carr fails to address the criteria necessary for her statements to constitute judicial admissions, even assuming her statements are eligible under that doctrine. *See* ***Pettit***, 171 Wis. 2d at 646 ("We may decline to review issues inadequately briefed.").

bank branch to make an in-person payment. Bay Bank's submissions show that, despite Carr clearly being aware she was in arrears, she repeatedly failed to appear in person as promised.[7] By contrast, Carr failed to make any evidentiary submission prior to the circuit court entering its decision. This is significant because a factfinder would have no basis on this record to reasonably infer that Carr would have attended and cooperated with an in-person interview. Accordingly, we conclude Carr has failed to demonstrate any genuine issue of material fact that would necessitate a trial regarding Bay Bank's alleged failure to abide by the requirements of 24 C.F.R. § 203.604 (2016).

¶18 Finally, Carr argues the circuit court erred by failing to provide her with time to respond to Bay Bank's supplemental affidavit. Carr ignores that she was provided an extended opportunity to submit argument and evidence in response to Bay Bank's summary judgment motion, yet she failed to do so in a timely manner. Moreover, there was nothing impermissible about the court permitting Bay Bank to file a supplemental affidavit following the motion hearing to respond to Carr's newly raised defenses. *See* WIS. STAT. § 802.08(3) (2015-16) ("The court may permit affidavits to be supplemented or opposed by … further affidavits.").[8] Carr cites no authority that required the circuit court to make a similar allowance for Carr.

[7] Carr emphasizes that in certain of these communications she expressed a desire to make payments and resolve her situation. Carr's intent aside, the requirement is of an in-person interview, and the only evidence of record demonstrates Carr repeatedly avoided appearing at the bank branch despite her promises to do so.

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

¶19 Relatedly, Carr asserts the circuit court should have considered an affidavit she filed after the court had entered its order granting summary judgment. Pursuant to the court's scheduling order, the time for Carr to submit her evidentiary materials had been expired for more than one month by the time this affidavit was filed. Carr did not file a motion for leave to file the belated affidavit, a motion for reconsideration, or a WIS. STAT. § 806.07 motion for relief from the judgment, any of which might have permitted the court to consider new evidence. Accordingly, there is no basis on this record to reverse the circuit court based on its refusal to consider her tardy affidavit.

By the Court.—Judgment affirmed.

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