COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP2481 **Cir. Ct. No. 2008CV791**

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

WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS TRUSTEE FOR PRETIUM MORTGAGE ACQUISITION TRUST,

PLAINTIFF-RESPONDENT,

V.

RANDY L. HILTNER AND JEAN M. HILTNER,

DEFENDANTS-APPELLANTS,

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., ACTING SOLELY AS A NOMINEE FOR GENERAL MORTGAGE HOME EQUITY GROUP,

DEFENDANT.

APPEAL from an order of the circuit court for Polk County: JEFFERY ANDERSON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Randy and Jean Hiltner, pro se, challenge an order denying their motion to vacate a default judgment of nondeficiency foreclosure and to allow a late answer. We affirm.

¶2 The Hiltners executed a note together with a mortgage, naming as the lender Chase Manhattan Mortgage Corporation, which later merged into Chase Home Finance LLC. The note was endorsed in blank. The foreclosure complaint alleged Chase Home Finance LLC, was the holder of the note and the mortgage. The complaint further alleged the Hiltners failed to make payments under the terms of the note and mortgage. The Hiltners were served with authenticated copies of the summons and complaint, but they filed no answer or other responsive pleading. A motion for default judgment and accompanying affidavit were filed, and a nondeficiency default judgment of foreclosure was entered in December 2008. The judgment provided, "That leave is hereby granted to the plaintiff to add defendants herein pursuant to section 846.09, Wis. Stats."[1]

¶3 An amended summons and complaint adding defendant Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for General Mortgage Home Equity Corp. was subsequently filed. While the case was pending, Chase Home Finance LLC merged into JPMorgan Chase Bank, National Association, which subsequently assigned the mortgage and judgment to Federal National

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

Mortgage Association. A petition to substitute Federal National Mortgage Association as the plaintiff was granted.

¶4 In January of 2016, the Hiltners filed a petition for an injunction, but they failed to appear at the hearing and the petition was denied on the merits. Federal National Mortgage Association later assigned the judgment and mortgage to Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, not individually but as Trustee for Pretium Mortgage Acquisition Trust (Wilmington). A petition to substitute Wilmington as the plaintiff was granted.

¶5 In September 2016, the Hiltners filed a motion to vacate the default judgment and to allow a late answer. The circuit court denied the motion. The Hiltners now appeal.

¶6 The Hiltners primarily argue that Chase Home Finance LLC "transferred away its interest in the Hiltner loan over five years before it commenced the action," and thus it lacked standing when the default judgment was entered. The Hiltners cite an unrecorded "Assignment of Mortgage" dated five days after the note originated, and five years prior to the foreclosure complaint. According to the Hiltners, when the foreclosure action was initiated, the note and the mortgage were thus separated and "Chase was nothing more than a debt-collecting loan 'servicer.'"

¶7 The circuit court correctly recognized that an instrument becomes payable to its bearer if endorsed in blank, and that instrument may be negotiated by transfer or possession alone until specifically endorsed. *See* WIS. STAT. § 401.201(2)(km)1. A person in possession of an instrument payable to its bearer is a holder of the instrument and entitled to enforce its provisions. *See* WIS. STAT. §§ 403.301, 403.205(2).

¶8 Here, the note was originally given to Chase Manhattan Mortgage Corporation. The note was endorsed in blank. The original lender merged into Chase Home Finance LLC, which was the original plaintiff in this case. The complaint alleged Chase Home Finance was the holder of the note. As holder of the note, it was entitled to enforce the note and mortgage. *See* WIS. STAT. § 403.301; *see also* ***Dow Family, LLC v. PHH Mortg. Corp.***, 2014 WI 56, ¶47, 354 Wis. 2d 796, 848 N.W.2d 728. The Hiltners make much of the fact that the loan was securitized, but an investor on a loan is immaterial if they are not the holder of the note. *See* ***Dow Family, LLC v. PHH Mortg. Corp.***, 2013 WI App 114, ¶23 n.9, 350 Wis. 2d 411, 838 N.W.2d 119, *aff'd*, 354 Wis. 2d 796. The complaint alleged that Chase Manhattan Mortgage Corporation was the original lender, and it continued to be the holder of the note as Chase Home Finance when the judgment was granted, because Chase Home Finance was the successor to Chase Manhattan Mortgage Corporation. Chase Home Finance had standing to pursue the remedy of foreclosure.

¶9 The Hiltners also argue the default judgment was obtained by misrepresentation. The Hiltners claimed in the circuit court they had only recently discovered an unrecorded assignment of mortgage, which they argued had the result of the default judgment being "not really a judgment at all." However, the Hiltners' argument is based upon an improper premise. The complaint alleged Chase Home Finance was the holder of the note. As holder of the note, it was entitled to enforce the note and mortgage. Any assignment of a mortgage—especially an unrecorded one—does not change that conclusion.

¶10 The Hiltners further argue entitlement to relief from the foreclosure judgment under WIS. STAT. § 806.07(1)(a), which allows a court to grant relief based on mistake, inadvertence, surprise, or excusable neglect. An order denying

relief under § 806.07(1) will not be reversed absent an erroneous exercise of discretion. ***Sands v. Menard, Inc.***, 2013 WI App 47, ¶25, 347 Wis. 2d 446, 831 N.W.2d 805.

¶11 The Hiltners' motion for relief from judgment was filed nearly eight years after the default judgment. The Hiltners have not asserted any fact, by affidavit or otherwise, that adequately explains why they did not file an answer or other responsive pleading within the allowable twenty days of being personally served with the summons and complaint. Quite simply, there has been no adequate showing of mistake, inadvertence, or surprise. There has also been no legitimate showing of excusable neglect for the Hiltners' years of inaction. The Hiltners take aim at the affidavits submitted on behalf of the plaintiffs in the circuit court in support of default judgment, but the Hiltners did not raise this issue below, and we will not consider it for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980).

¶12 The Hiltners also sought relief from the default judgment under WIS. STAT. § 806.07(1)(h), the "catch-all" provision allowing relief for any other reason justifying relief from the operation of the judgment. A court appropriately grants relief from a default judgment under sub. (1)(h) when extraordinary circumstances are present justifying relief in the interests of justice. ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶35, 326 Wis. 2d 640, 785 N.W.2d 493. Extraordinary circumstances are those in which the sanctity of the final judgment is outweighed by "the incessant command of the court's conscience that justice be done in light of *all* the facts." ***Id.*** When determining whether extraordinary circumstances are present, a court must consider a wide range of factors, keeping in mind the competing interests of finality of judgments and fairness in the resolution of the dispute. ***Id.***, ¶36.

¶13 Here, the circuit court considered proper factors. The court first concluded the Hiltners made the conscious and deliberate decision not to answer the complaint after being personally served. The Hiltners insist they did not make a conscious, deliberate choice to delay the proceedings, but "simply were not aware of the facts, which were completely within the custody and control of the Plaintiffs and their counsel at all times relevant." However, there is no evidence in the record on appeal demonstrating the Hiltners did not have the ability to timely respond to the complaint and seek discovery; they simply did not do so.

¶14 As to whether the Hiltners received ineffective assistance of counsel, the circuit court properly found they could not make this claim, as they were not represented by counsel in the foreclosure proceedings. As to the merits of the claim, the court noted there was no affidavit from the Hiltners disputing the allegations in the complaint regarding the existence of the debt, the default, or the amount owed. The only affidavit from the Hiltners pertaining to the allegation that Chase Home Finance was the holder of the note was the affidavit of Selena Nieman, which the court was within its discretion to discount because her affidavit consisted primarily of legal arguments from a non-lawyer based upon Washington law.

¶15 The circuit court also found it inequitable to grant relief because the failure to answer the complaint, and other delays caused by the Hiltners, resulted in a significant delay in the foreclosure process resulting in significant expense over the years since the default judgment was entered. The court appropriately concluded that the wide range of factors "flow in favor of the plaintiff and the finality of the judgment from 2008." No extraordinary circumstances justify relief in the interests of justice.

¶16 Finally, the Hiltners argue the default judgment was "void" because the complaint upon which it was based was no longer the operative pleading in the case. The Hiltners contend the amended complaint superseded the original complaint, and no judgment was rendered as a result of the amended complaint. However, WIS. STAT. § 846.09 allows a foreclosing plaintiff to add additional parties who may claim an interest in the property to the foreclosure after a judgment has been entered. The default judgment itself also expressly granted the plaintiff leave to amend the complaint to add defendants pursuant to § 846.09.

¶17 A defaulting party cannot answer an amended complaint in an effort to cure its default, when the party is already in default at the time the amended complaint is filed, unless the amended complaint contains new or additional claims for relief against a defendant. *See* ***Ness v. Digital Dial Commc'ns, Inc.***, 227 Wis. 2d 592, 597-98, 596 N.W.2d 365 (1999). The Hiltners concede the amended complaint did not contain any new or additional claims for relief against the Hiltners. The amended complaint mirrored the initial complaint, other than the addition of the junior lien holder MERS as an "Added Defendant," and the allegation in paragraph 8 of the amended complaint that the added defendants "have or claim to have an interest in the mortgaged premises …." Consequently, the default judgment remained as a binding judgment against the Hiltners. Although the Hiltners assert ***Ness*** is in conflict with more recent case law, such as ***Miller***, this argument was also raised for the first time on appeal and therefore will not be further addressed. *See* ***Wirth***, 93 Wis. 2d at 443.

By the Court.—Order affirmed.

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