COURT OF APPEALS
DECISION
DATED AND FILED

February 7, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-0483

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

ASSOCIATED BANK - MILWAUKEE,

PLAINTIFF-RESPONDENT,

V.

CHARLES L. WENDT,

DEFENDANT-APPELLANT,

ROSEMARIE WENDT, JANE WENDT DOE AND WAUKESHA STATE BANK,

DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. This appeal stems from a foreclosure action brought by Associated Bank - Milwaukee (the Bank) after Charles L. Wendt defaulted on his mortgage loan. Wendt filed a counterclaim alleging malicious prosecution and seeking compensatory and punitive damages. The circuit court granted summary judgment of foreclosure in favor of the Bank, awarded the Bank attorney's fees and, following a second motion for summary judgment, dismissed Wendt's counterclaim. Wendt appeals. We affirm.

¶2 In August 1992, Wendt executed a promissory note to the Bank in the amount of $109,500 in connection with his purchase of a home located in the city of Waukesha, Wisconsin.[1] Three years later, Wendt renewed this mortgage note.[2] He later executed another mortgage note in the amount of $6,000 in connection with a home equity loan.[3] Each of these notes (collectively, the "mortgage note") was secured by a mortgage on the home.

¶3 The mortgage note became due and payable in full on August 18, 1998. However, Wendt failed to make payment in full on that date. Wendt was thus in default as specified by the terms of the mortgage note. He met with a Bank representative to discuss obtaining an extension of his financing, but the parties were unable to negotiate continued financing, in part because they could not agree on an appropriate interest rate. As part of this process, Wendt filled out an application for additional financing, but he left the loan application substantially incomplete. Wendt also objected to the Bank's subsequent request for certain

[1] Wendt executed the original mortgage notes in favor of Central Bank. Associated Bank is the successor in interest to Central Bank.

[2] The renewal note of $105,604.53 was partially reduced by payments made by Wendt.

[3] Wendt executed the home equity note on March 20, 1997.

financial information in connection with his loan application. Specifically, Wendt admits that the Bank repeatedly requested copies of his 1996 and 1997 income tax returns and that he refused to provide them because he "didn't see a purpose in [the Bank] having it." He orally informed Bank representatives that he intended to sell the house, and contends that there was sufficient equity in the home that the Bank should not have required personal financial information from him. He never provided the Bank with copies of the requested tax returns.[4]

¶4 In December 1998, the Bank advised Wendt, in writing, that it would not extend his financing in part because of Wendt's failure to cooperate. The Bank reiterated this position by letter dated February 17, 1999. Wendt made a single, abortive attempt to obtain financing through another financial institution, but failed to do so. Throughout this period, Wendt had continued to send monthly mortgage payments to the Bank, which the Bank applied to the accrued principal and interest, consistent with the terms of the mortgage note.

¶5 On March 10, 1999, the Bank commenced a foreclosure action against Wendt. Wendt filed a counterclaim alleging malicious prosecution and seeking compensatory and punitive damages. He moved to dismiss the foreclosure action, asserting that the Bank's acceptance of his monthly installment payments from August 18, 1998, through March 1, 1999, constituted a waiver of the default. The Bank moved for summary judgment.

[4] The parties agree that in February 1999, Wendt provided the first page of his 1996 Income Tax Return to the wrong branch office of the Bank, but the full tax returns were never provided.

¶6 During this time, Wendt accepted an offer to purchase the home for $195,000,[5] and sought a court order to discharge the lis pendens and to release the liens on the mortgages to facilitate the sale. After hearing the parties' arguments, the court signed an order the parties hoped would permit the sale to proceed, while protecting the Bank's security interest in the property. However, because of the existence of the lis pendens, the title company declined to issue title insurance and the sale did not close on June 29, 1999, as scheduled. On July 2, 1999, the court held a hearing on Wendt's emergency motion to discharge the lis pendens. At this stage of the proceedings it was clear that much of the parties' dispute involved whether Wendt should have to pay the Bank's attorney's fees incurred in connection with the foreclosure proceeding.

¶7 The court ordered Wendt to deposit $20,000 of the sale proceeds in escrow as security for the Bank's claimed attorney's fees. With this security, the Bank discharged the lis pendens and the sale of the home closed on July 2, 1999.

¶8 At the subsequent hearing on the Bank's motion for summary judgment, the court held that the Bank had established that it was entitled to the judgment of foreclosure as a matter of law.[6] The court awarded the Bank attorney's fees through July 2, 1999, the date of the sale, but declined to dismiss Wendt's counterclaim.

¶9 On October 5, 1999, in reliance upon uncontested affidavits provided by the Bank, the court signed an order awarding the Bank $8,754.64 in

[5] Wendt accepted the offer to purchase on April 16, 1999. He informed the Bank of the pending sale some weeks later.

[6] The order for judgment entered August 12, 1999, provided for a judgment of foreclosure on the property, but noted that the property had been sold to a third party.

attorney's fees. When Wendt declined to withdraw his counterclaim, the Bank filed a second motion for summary judgment. Wendt, in turn, sought reconsideration of the court's order granting attorney's fees and the judgment of foreclosure.

¶10 At the hearing on these matters, the circuit court denied Wendt's motion for reconsideration. The court also granted summary judgment to the Bank on Wendt's counterclaim, finding that the claim was unsupported by record evidence. The court declined to award the Bank additional attorney's fees. This appeal followed.

¶11 We first address whether the circuit court properly granted summary judgment to the Bank on its foreclosure action against Wendt. Our review of a circuit court's grant of summary judgment is de novo. *See* ***M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). Summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (1999-2000);[7] ***Radlein v. Indus. Fire & Cas. Ins. Co.***, 117 Wis. 2d 605, 609, 345 N.W.2d 874 (1984).

¶12 Mortgages are treated and construed as contracts. *See* ***Mut. Fed. Sav. & Loan Ass'n v. Wis. Wire Works***, 58 Wis. 2d 99, 104-05, 110-11, 205 N.W.2d 762 (1973) (***Wire Works I***). Accordingly, we turn first to the language of the mortgage note, which provides in pertinent part as follows:

> If I fail to make a payment under this Note when due, and the default continues for 10 days ... Lender may declare the

[7] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

> entire balance of principal and accrued interest to be payable immediately, without notice or demand.
>
> ... Without affecting my liability or the liability of any endorser, surety or guarantor, Lender may, without notice, grant renewals or extensions, accept part payments ….
>
> I agree to pay all costs of collection before and after judgment, including, to the extent not prohibited by law, reasonable attorneys' fees.
>
> This note is intended by Lender and me as a final expression of this Note and as a complete and exclusive statement of its terms, there being no conditions to the enforceability of this Note. This Note may not be supplemented or modified except in writing.

¶13 Pursuant to the express terms of the mortgage note, when the mortgage loan became due in full and remained unpaid for a period of ten days, Wendt was in default, and the Bank was entitled to commence foreclosure proceedings. *See generally* ***Scheibe v. Kennedy***, 64 Wis. 564, 567, 25 N.W. 646 (1885) (holding that "[i]t must be deemed settled as the law of this court that, in the absence of an agreement to the contrary, a mortgagee may maintain an action to foreclose a mortgage when there is any breach of the condition of the mortgage by a neglect or refusal on the part of the mortgagor to pay the debt secured at the time or times when the same became due and payable."). The affidavits before the circuit court raised no factual dispute that a default had occurred, and that the Bank was entitled to judgment of foreclosure. Further, much of the conduct on which Wendt relies to suggest that the Bank acted improperly occurred postdefault and would not affect the foreclosure judgment.

¶14 Nonetheless, Wendt vigorously contends that the Bank lacked an adequate equitable basis for commencing the foreclosure action and for continuing to pursue the action after learning that Wendt had accepted an offer to purchase the property. This contention forms the primary basis for his affirmative defense

to the foreclosure action as well as his counterclaim. Specifically, Wendt argues that because there was substantial equity in the home—more than enough to pay the mortgage note in full—the Bank's security was not impaired. Therefore, he argues, the Bank was not equitably entitled to pursue the foreclosure action. In the alternative, Wendt argues that once he had advised the Bank that he had accepted an offer to purchase the home, the Bank was no longer entitled to continue the foreclosure action.

¶15 It is true that foreclosure actions are subject to equitable considerations. *See* ***Frick v. Howard***, 23 Wis. 2d 86, 96, 126 N.W.2d 619 (1964); ***Wire Works I***, 58 Wis. 2d at 105 (holding that a "due on sale" provision of a note and mortgage is enforceable, subject to any equitable defenses that would make it inequitable to permit foreclosure and which would justify the denial of the contract right to foreclose). However, we hold that Wendt has failed, as a matter of law, to establish an equitable defense that would justify denying the Bank's contractual right to foreclose in this case.

¶16 First, from the perspective of whether the Bank's security was impaired, an accepted offer to purchase is a binding contract, but does not equate to a sale of the property. Numerous intervening considerations or contingencies may affect whether the anticipated sale will actually close. Moreover, the question of whether the physical security is impaired is not conclusive in the balancing of equities. *See* ***Mut. Fed. Sav. & Loan Ass'n v. Wis. Wire Works***, 71 Wis. 2d 531, 539, 239 N.W.2d 20 (1976) (***Wire Works II***). Other factors are relevant as well. As the Wisconsin Supreme Court stated in a related context:

> [B]asic to the theory of impairment of security is that the lender not only makes a valued judgment as to the adequacy of the physical security but also relies upon its evaluation of the business character and reputation of the

> borrower in determining whether the loan should be made and the rate of interest to be charged.... This business judgment should in most cases be left solely to the discretion of the lender.

Id. at 539-40.

¶17 Here, it is clear that Wendt was not cooperative with the Bank in its postdefault negotiations for continued financing. Wendt admits that he declined to provide the requested financial information to the Bank and that he failed to return the Bank's phone calls. He further admits that he delayed the refinancing process, hoping the house would sell so that he would not have to pay the closing costs associated with refinancing. The record does not reflect that the records requested by the Bank were unusual or inconsistent with the Bank's standard practice in evaluating a loan renewal request of this type. Further, by the time the Bank was advised of the accepted offer to purchase, it had incurred considerable attorney's fees, for which Wendt was contractually liable. We conclude that under the facts of this case, the Bank was not, as a matter of law, equitably precluded from pursuing a foreclosure action to protect its security or to preserve its right to recover the costs of collection.

¶18 Wendt also contends that the Bank waived its right to seek foreclosure by accepting his continued monthly payments. This argument is without merit. When the Bank commenced the foreclosure action, the *entire* balance of the principal and accrued interest was due, not merely several installments of principal and interest. Here, Wendt could only have obtained a dismissal by paying the entire balance of the unpaid principal and interest. The Bank, however, had the right to accept any payments made and to apply those payments in its discretion to interest, principal and other payments due, as clearly provided in the mortgage note quoted above. There was no contention that Bank

officers ever told Wendt that the Bank intended to waive its foreclosure rights by accepting partial payments after default. We conclude that the circuit court did not err in granting the Bank's motion for summary judgment of foreclosure.

¶19 We turn to the question of whether the circuit court properly granted the Bank's second motion for summary judgment, dismissing Wendt's counterclaim for malicious prosecution. Again, we affirm.

¶20 Wendt's counterclaim alleges that the foreclosure proceeding would "inevitably and permanently damage [Wendt's] credit record." It further alleges that "the commencement of this foreclosure action, without engaging in good faith negotiations, and after having waived its right of enforcement of the expired note by accepting monthly payments, constituted malicious conduct toward the plaintiff or was done in intentional disregard of [Wendt's] rights." We hold that the record evidence does not support the counterclaim, as alleged. The circuit court did not err in granting the Bank's second motion for summary judgment, dismissing Wendt's counterclaim.

¶21 The Bank was under no obligation to negotiate with Wendt for an extension of his financing after he defaulted on the mortgage note. It did so, however, and the record evidence cannot support a finding that the Bank negotiated in bad faith. Rather, the record evidence indicates that the Bank formally advised Wendt that it would not extend continued financing and commenced the foreclosure proceeding only after Wendt had repeatedly refused to provide copies of the tax returns which were a prerequisite to processing his loan application, and otherwise failed to cooperate with the refinancing process. We have already rejected Wendt's assertion that the Bank's acceptance of monthly payments waived its right to pursue a foreclosure proceeding, holding that the

Bank's actions in this respect were wholly consistent with the terms of the mortgage note. And the record is devoid of evidence that the foreclosure proceeding irreparably harmed Wendt's credit record. Therefore, we affirm the circuit court's decision granting summary judgment and dismissing Wendt's counterclaim.[8]

¶22 Wendt also challenges the circuit court's award of attorney's fees.[9] The mortgage note explicitly required Wendt to pay the reasonable costs and attorney's fees incurred in the collection of the principal and interest due the Bank in case of default. We thus affirm the circuit court's order awarding the Bank attorney's fees.

¶23 We also reject Wendt's claim that the circuit court erred by failing to hold a separate hearing on the appropriate amount of fees to be awarded. Absent material issues of fact, the circuit court did not need to hold an evidentiary hearing. A circuit court generally "has the expertise to evaluate the reasonableness of the fees with regard to the services rendered." ***Tesch v. Tesch***, 63 Wis. 2d 320, 335, 217 N.W.2d 647 (1974). "It is not really the type of issue or question of fact where an adversary presentation is necessary to the presentation of evidence necessary to a determination." ***Id.*** Further, an itemized bill submitted by affidavit may be sufficient evidence to establish attorney fees. *See* ***id.*** at 334.

[8] We reject Wendt's claim that summary judgment was improper because discovery was ongoing. Wendt did not submit affidavits describing additional evidence he intended to obtain through further discovery that would have established a material fact precluding summary judgment.

[9] By order dated October 5, 1999, the court awarded the Bank attorney's fees and expenses in the amount of $8,754.64.

¶24 Counsel for the Bank supplied the court with an affidavit in support of the amount of fees and costs claimed by the Bank through July 2, 1999. Wendt submitted no opposing evidence and did not challenge the reasonableness of the fees and costs claimed by the Bank. Thus, as the matter was uncontested, it was proper for the circuit court to determine the appropriate amount of fees without an additional hearing on the matter. There is no evidence that the circuit court misused its discretion in making this determination. We affirm the circuit court's order awarding the Bank attorney's fees and related costs in the amount of $8,754.64.

¶25 Finally, we consider the Bank's motion for the assessment of costs on this appeal on the grounds that Wendt's appeal was frivolous. WIS. STAT. RULE 809.25(3)(c). We decline to find that the appeal was frivolous as a matter of law.

By the Court.—Judgment and order affirmed.

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