

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 29, 2011

A. John Voelker
Acting 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. 2010AP2334

Cir. Ct. No. 2009CV749

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**BAC HOME LOAN SERVICING, L.P. F/K/A COUNTRYWIDE
HOME LOANS SERVICING L.P.,**

PLAINTIFF-RESPONDENT,

v.

MICHAEL J. WILLIAMS AND NICOLE J. WILLIAMS,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Sauk County:
JAMES EVENSON, Judge. *Reversed and cause remanded.*

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Michael and Nicole Williams (collectively, Williams) appeal a summary judgment order that granted BAC Home Loan Servicing (BAC) a judgment of foreclosure against them. Williams raises multiple

arguments challenging the judgment of foreclosure, and further contends the circuit court erred in denying the counterclaims by an earlier order. We conclude that the circuit court properly dismissed the counterclaims, but that the summary judgment materials were insufficient to establish that BAC was the holder of the note upon which the foreclosure was based. Accordingly, we reverse the judgment of foreclosure and remand for further proceedings.

BACKGROUND

¶2 On January 25, 2008, Williams executed a promissory note in favor of One Choice Mortgage, LLC, secured by a mortgage on certain residential property in Sauk County. On August 7, 2009, BAC filed this action, seeking to foreclose on the property without deficiency, pursuant to WIS. STAT. § 846.101 (2009-10).¹

¶3 BAC alleged in its complaint that it was the current holder of the note and mortgage, and that Williams had failed to make contractually required payments. Williams filed an answer, subsequently amended, admitting that Williams had failed to make payments, but raising a series of affirmative defenses. Williams also set forth a series of counterclaims seeking damages for the alleged failure of BAC (and/or its predecessors in interest) to comply with several federal administrative code provisions and for negligence, product liability, lender liability, and strict liability. BAC moved to dismiss the counterclaims and further sought summary judgment on the foreclosure.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 The summary judgment materials included certified copies of the original note and mortgage, which were both issued to One Choice Mortgage through its nominee Mortgage Electronic Registration Systems, Inc., and an uncertified photocopy of an “Assignment of Mortgage” form. This form stated that Mortgage Electronic Registration Systems, Inc. “assigns to BAC ... the mortgage executed by [Williams] to Mortgage Electronic Registration Systems Inc., as mortgagee on the 25th of January, 2008, together with the previously transferred note secured thereby” The assignment form was accompanied by an affidavit from a BAC employee. The employee averred that she was a custodian of BAC’s business records, having

possession, control and responsibility for the accounting and other mortgage loan records relating to the defendants’ mortgage loan which are created and kept and maintained in the ordinary course of business as a regular business practice and are prepared at or near the time of the transaction or event by a person with knowledge.

The affidavit further stated that the employee had personally inspected the records relating to Williams, and had personal knowledge of how such records generally were created and kept and maintained.

¶5 The circuit court dismissed the counterclaims and granted summary judgment on the foreclosure, and Williams appeals.

STANDARD OF REVIEW

¶6 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994).

We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins a material issue of fact or law.... [Next,]

we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute that entitle the opposing party to a trial.

Frost v. Whitbeck, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325 (citations omitted), *aff'd*, 2002 WI 129, 257 Wis. 2d 80, 654 N.W.2d 225.

DISCUSSION

Summary Judgment on the Foreclosure

¶7 Although Williams raises multiple arguments, we conclude that one issue is dispositive as to whether summary judgment was properly granted on BAC's foreclosure action. Specifically, we agree with Williams that BAC failed to make a *prima facie* case that it was in fact the current holder of the promissory note.

¶8 We first question whether the form assigning the *mortgage* to BAC, and making reference to a "previously transferred note" was actually the effective instrument transferring the *promissory note* to BAC. If the note had in fact been previously transferred, it would seem that the prior document would be necessary to establish that transfer, and should have been included in the summary judgment materials. In any event, as discussed below, even assuming that the document assigning the mortgage to BAC also assigned the promissory note or could properly be used to document the assignment by reference, we conclude that the assignment document was insufficiently authenticated to satisfy the summary judgment standard.

¶9 Affidavits in support or in opposition to a motion for summary judgment "shall be made on personal knowledge and shall set forth such

evidentiary facts as would be admissible in evidence.” WIS. STAT. § 802.08(3). In order to be admissible in evidence, a document must be authenticated by “evidence sufficient to support a finding that the matter in question is what its proponent claims.” WIS. STAT. § 909.01. Certain documents may be self-authenticating, including certified copies of public records such as recorded instruments, and certified domestic records of regularly conducted activity. WIS. STAT. § 909.02(4) and (12). The rule on self-authentication for records of regularly conducted activity parallels the hearsay exception for such records, allowing admission of

a memorandum, report, record, or data compilation, in any form, of acts events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness.

Cf. WIS. STAT. §§ 908.03(6) and 909.02(12).

¶10 A records custodian seeking to authenticate a record must be *qualified* to testify both that the record at issue was made by a person with knowledge or from information transmitted by a person with knowledge, and that this was done in the course of a regularly conducted activity. *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶20, 324 Wis. 2d 180, 781 N.W.2d 503. Being qualified means that the custodian possesses sufficient personal knowledge to testify about such things as who recorded or transmitted the information and the contemporaneousness of the record in relation to the events it purports to document. *See id.*, ¶16.

¶11 We first note that the copy of the mortgage assignment form included in the summary judgment materials here was not certified, and therefore

would not be admissible as a self-authenticated public record, even if it were recorded. Next, we question whether a form assigning a mortgage or promissory note from one party to another based upon consideration, constitutes “a memorandum, report, record, or data compilation” so as to qualify as a record of regularly conducted activity, subject to the self-authentication rule.

¶12 Even assuming for the sake of argument only that such a signed, notarized, and recorded instrument could be considered a “record” of regularly conducted activity, we are not persuaded that the BAC employee’s affidavit established that she was qualified to authenticate the assignment form here. The employee’s affidavit makes conclusory assertions parroting the statutory language that she has personal knowledge that the records in her custody are prepared in the ordinary course of business at or near the time of the transaction or event by a person with knowledge of the underlying transactions. However, it does not include any specific assertions to explain where the copy of the assignment form attached to her affidavit came from—for instance, whether it was made from the original, and if so, by whom. The fact that the employee may have been in a position to know how BAC prepared its account statements, which we would agree qualify as ordinary business records, does not mean that she was in a position to authenticate an uncertified copy of an instrument that she did not see executed.

¶13 Because the copy of the document purportedly assigning to BAC Williams’ mortgage—and by reference, the promissory note—was not properly authenticated, it did not meet the standard of admissible evidence required for summary judgment materials under WIS. STAT. § 802.08(3). Therefore, BAC failed to make a prima facie case that it had standing to foreclose based upon Williams’ failure to pay according to the terms of the promissory note. In light of

BAC's failure, we do not need to address whether any of the affirmative defenses asserted in Williams' answer would also have created material disputes for the circuit court. Accordingly, we reverse the circuit court's summary judgment decision and remand with directions that the matter proceed with discovery² and trial on BAC's foreclosure claim.

Williams' Counterclaims

¶14 Williams filed counterclaims alleging violations of 12 U.S.C. §§ 2605(b), 2605(c), 2605(e), 2605(e)(3), negligence, product liability, lender liability, and strict liability for alleged violations of the Truth in Lending Act.

¶15 Williams first argues that the circuit court violated due process by dismissing all counterclaims without providing an adequate opportunity to submit additional evidence. Williams correctly points out that when matters outside the pleadings are presented on a motion to dismiss, the motion shall be treated as one for summary judgment. WIS. STAT. § 802.06(2)(b). However, as we explained above, the first step in summary judgment methodology is to examine the sufficiency of the pleadings. If the pleadings do not state a claim upon which relief can be granted, there is no need for further analysis. Therefore, any error the circuit court may have committed in refusing to allow Williams to submit additional materials in response to BAC's motion to dismiss was rendered harmless once the court determined that Williams' pleadings in fact failed to state

² Williams complains that the circuit court ignored discovery requests, but does not specify what specific materials were sought. We therefore do not address any particular discovery matter in this appeal.

a claim, and the circuit court did not violate Williams' due process rights by dismissing the counterclaims based on the pleadings alone.

¶16 Williams next contends that the circuit court applied the wrong standard in considering whether to dismiss the counterclaims because it did not mention the oft-cited language that a claim should be dismissed only if it is “quite clear” that under no circumstances could the plaintiff prevail. Instead, the circuit court cited *Doe v. Archdiocese of Milwaukee*, 2007 WI 95, ¶12, 303 Wis. 2d 34, 734 N.W.2d 827, for the proposition that “[d]ismissal of a claim is improper if there are any conditions under which the [pleading party] could recover.” The minor difference in language is a distinction without a difference. In short, we are satisfied the circuit court properly understood that it was to liberally construe the pleadings when testing their sufficiency.

¶17 Turning to the merits, Williams challenges the circuit court's conclusion that the counterclaims of negligence, product liability, and strict liability were barred by the economic loss doctrine. Williams complains that the circuit court did not adequately explain why the economic loss doctrine applied to these claims, and why Williams did not qualify for an exception. The economic loss doctrine “preclud[es] contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship.” *Kaloti Enterprises, Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶27, 283 Wis. 2d 555, 699 N.W.2d 205 (citations omitted). Contrary to Williams' assertions, neither the status of being a consumer nor a lack of knowledge about the economic loss doctrine relieves a party from its constraints. Williams correctly points out that there is a limited exception to the economic loss doctrine when a contract was induced by fraud. *See Digicorp, Inc. v. Ameritech Corp.*, 2003 WI 54, ¶¶51-52, 262 Wis. 2d 32, 662 N.W.2d 652. That exception does not apply here, however,

because the instances of fraud Williams alleges in the complaint—namely, an erroneous real estate appraisal and a misrepresentation about whether a damages clause should apply to the APR rate—were allegedly committed by persons who were not employees of BAC or otherwise parties to the action.³ In sum, Williams’ claims of negligence, product liability, and strict liability clearly lie in tort, and were plainly associated with contractual relationships arising out of a series of mortgages. The court did not need to say more to dispose of counterclaims six, seven and nine.

¶18 Williams presents no argument that the circuit court erred in the dismissal of the other counterclaims.

¶19 Finally, Williams contends the circuit court should have imposed sanctions on BAC based upon what Williams views as inaccurate statements in BAC’s filings to the court. However, the challenged statements appear simply to be legal propositions or characterizations that Williams disagrees with. The circuit court was well within its discretion to determine that there had been no ethical violation warranting sanctions.

By the Court.—Judgment reversed and cause remanded.

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

³ Williams also contends that the circuit court should have granted Williams’ motion to add the appraiser and real estate broker to the action. As BAC points out, however, that motion was not filed until after the counterclaims had already been dismissed, and the alleged misconduct related to prior, satisfied mortgages that were not the subject of the current foreclosure action.

