COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2750 **Cir. Ct. No. 2009CV493**

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

SECURITY BANK,

PLAINTIFF-RESPONDENT,

V.

STEPHEN D. WILLETT AND MARY M. WILLETT,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Dunn County: ROD W. SMELTZER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Stephen and Mary Willett appeal a summary judgment in favor of Security Bank in this collection action. The Willetts argue the circuit court erroneously denied their motion to compel discovery. They also

assert the court improperly granted Security Bank's summary judgment motion and dismissed their counterclaims. We affirm.

BACKGROUND

¶2 The relevant facts are undisputed. On November 5, 2009, Security Bank commenced a collection action against the Willetts,[1] alleging that they executed a consumer note in June 2006 to Farmer's Bank for $43,150. It further alleged that the note was assigned to Security Bank on February 20, 2007, and that the note matured and was due in full on June 10, 2009. A copy of the note was attached to the complaint. It bore a nine percent interest rate and indicated that Willett was required to make monthly payments of $600 until the note came due.

¶3 Willett answered and raised numerous affirmative defenses and counterclaims. In essence, he alleged that a prior oral agreement with officials from Farmer's Bank modified both the maturation date and interest rate stated in the contract.

¶4 Willett filed several discovery requests with Security Bank and eventually filed a motion to compel. Security Bank objected to each of Willett's requests on relevancy grounds, and the court denied Willett's motion to compel.

¶5 Security Bank filed a motion for summary judgment, which the circuit court granted following a hearing. It also dismissed Willett's counterclaims.

[1] Although Stephen and Mary Willett are both parties to this appeal, Mary appears to be involved only by her marriage to Stephen. We therefore refer only to Stephen Willett for the remainder of this opinion.

DISCUSSION

¶6 Willett raises three issues on appeal. First, he argues the circuit court erroneously denied his motion to compel discovery. Second, he asserts material issues of fact precluded the court from granting Security Bank's motion for summary judgment. Finally, Willett contends the court improperly dismissed his counterclaims.

I. Motion to compel discovery

¶7 We review the denial of a motion to compel discovery for an erroneous exercise of discretion. ***Sands v. Whitnall Sch. Dist.***, 2008 WI 89, ¶13, 312 Wis. 2d 1, 754 N.W.2d 439. "Under that standard, we will sustain discretionary acts if we find the circuit court examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." ***Id.*** We review de novo whether the circuit court applied the proper legal standard. ***Id.*** "The burden of proof is on the appellant to show that the circuit court erroneously exercised its discretion in granting a litigant's right to discovery." ***Id.***

¶8 Willett demanded production of all documents relating to loan reviews by Farmer's Bank, the Federal Deposit Insurance Corporation, the Wisconsin Department of Financial Institutions, and the Federal Reserve. The motion to compel cited WIS. STAT. § 401.208 (2007-08), as the basis for these requests.[2] That statute directs how particular provisions in an agreement must be

[2] 2009 Wis. Act 320, § 8 repealed and recreated WIS. STAT. ch. 401. The current version of the statute is WIS. STAT. § 401.309 (2009-10).

(continued)

construed. Specifically, a party may accelerate payment or require additional collateral "at will" or "when the party deems himself or herself insecure" only if the party has a good faith belief that the prospect of payment or performance is impaired.[3] Willett's motion stated that discovery was necessary "to determine if there were any grounds upon which Security Bank could deem itself insecure and accelerate the due date of the consumer loan …."[4]

¶9 Security Bank objected to the requested discovery on relevance grounds, asserting that it had not accelerated the due date of the note. We agree. The contract plainly provides that a final payment of the unpaid balance and

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

[3] WISCONSIN STAT. § 401.208 (2007-08), reads in its entirety:

> **401.208 Option to accelerate at will.** A term providing that one party or the party's successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when the party deems himself or herself insecure" or in words of similar import shall be construed to mean that the party may do so only if the party in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

[4] In his reply brief, Willett contends the requested discovery was "needed to determine the standing of Security Bank in the action." This ground was not raised in Willett's motion before the circuit court and we therefore decline to consider it. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980).

Along the same lines, Willett repeatedly contends he has no knowledge of the "contractual basis upon which Security Bank has standing to commence this action; and that he has no knowledge of any reason (business, financial, legal, or otherwise) that Security Bank would continue this action." Yet the contract, whose authenticity Willett has not challenged, is stamped on the front page with an assignment from Farmer's Bank to Security Bank. The assignment concludes, "**PAY TO THE ORDER OF SECURITY BANK**," and purports to have been signed by a Farmer's Bank official. Willett has not offered any evidence, and therefore has not raised a genuine issue of material fact, to challenge the assignment's validity.

accrued interest was due on June 10, 2009. There is no evidence Security Bank demanded payment of the unpaid balance before that date.

¶10 In general, a party is entitled to discovery of all nonprivileged information "relevant to the subject matter involved in the pending action." WIS. STAT. § 804.01(2)(a). Because the requested discovery was irrelevant, the circuit court properly exercised its discretion.

II. Summary judgment

¶11 Summary judgment is appropriate only if "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). "[T]he mere existence of *some* alleged factual dispute … will not defeat an otherwise properly supported motion for summary judgment[.]" ***Baxter v. DNR***, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) (citation omitted). A factual issue is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" ***Id.*** (quoting ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248 (1986)). "A 'material fact' is one that is of consequence to the merits of the litigation." ***Schmidt v. Northern States Power Co.***, 2007 WI 136, ¶24, 305 Wis. 2d 538, 742 N.W.2d 294 (citation omitted). Whether the circuit court properly granted summary judgment is a question of law that this court reviews de novo. ***Id.***

¶12 Willett filed two affidavits in opposition to Security Bank's motion for summary judgment.[5] In essence, he averred that he had not agreed to the terms appearing on the face of the loan document. Specifically, Willett stated that he

[5] Willett did not file a brief to accompany either affidavit.

had orally agreed with officers from Farmer's Bank that the interest rate would be fixed for three years, after which the rate would be adjusted and the loan extended. Willett argues that his affidavits create a factual issue regarding the terms and conditions of the oral agreement.

¶13 Whether a prior oral agreement has any bearing on a written instrument is governed by the parol evidence rule, a rule of substantive contract law. *See* ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 34, ¶36, 330 Wis. 2d 340, 793 N.W.2d 476. Our supreme court has stated the rule as follows:

> When the parties to a contract embody their agreement in writing and intend the writing to be the final expression of their agreement, the terms of the writing may not be varied or contradicted by evidence of any prior written or oral agreement in the absence of fraud, duress, or mutual mistake.

Id. (quoting ***Dairyland Equip. Leasing, Inc. v. Bohen***, 94 Wis. 2d 600, 607, 288 N.W.2d 852 (1980)). The rule is designed to promote "the integrity, reliability, and predictability of written contracts and to reduce the threat of juries being misled or confused by statements or negotiations that may have taken place before a contract was entered into." ***Id.***

¶14 Our first task is to determine whether the parties intended the note to be the final and complete expression of their agreement. *See* ***id.***, ¶37. If so, the contract is considered fully integrated, and the court may not consider evidence of any prior or contemporaneous oral or written agreement in the absence of fraud, duress, or mutual mistake (none of which Willett argues are present). *See* ***id.***

¶15 In determining whether a contract is fully integrated, we may consider "merger" clauses contained in the written agreement. Merger clauses are written provisions that exclude additional understandings or agreements not

contained in the writing. ***Dairyland***, 94 Wis. 2d at 608. "[A] written provision which expressly negatives collateral or antecedent understandings makes the document a complete integration." ***Id.***

¶16 Here, the note contains a merger clause. Section 13, entitled "Interpretation," states,

> This Note is intended by Maker and Lender 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.

Our supreme court has concluded that nearly identical language in another contract "unambiguously demonstrates the parties' intent to exclude additional understandings or agreements not contained in the [written instrument]." ***Town Bank***, 330 Wis. 2d 340, ¶¶42-43. The parol evidence rule therefore bars consideration of the alleged oral agreement.

¶17 We would not consider the prior oral agreement even if the contract were not fully integrated. In the case of a partially integrated writing, "it is proper to consider parol evidence which establishes the full agreement, *subject to the limitation that such parol evidence does not conflict with the part that has been integrated in writing*." ***Dairyland***, 94 Wis. 2d at 607-08; *see also* ***Conrad Milwaukee Corp. v. Wasilewski***, 30 Wis. 2d 481, 488, 141 N.W.2d 240 (1966) (oral portion of an agreement cannot contradict the written part). The alleged oral agreement contradicts that portion of the written agreement requiring a final payment on June 10, 2009. Thus, the circuit court properly refused to consider evidence of the oral agreement.

¶18 Having resolved the parol evidence issue against Willett, we turn to the note's plain language. The contract unambiguously required Willett to make a final payment on June 10, 2009. Karen Smith, a Security Bank employee, indicated in an affidavit that Willett "fail[ed] to pay the note in full when it matured on June 10, 2009." Though Willett denies that he is in default, he has not supplied any evidence that he made the required payment. Accordingly, Willett has failed to create a genuine issue of material fact, and the circuit court properly granted Security Bank's motion for summary judgment.

III. Counterclaims

¶19 Willett's final argument is that the circuit court improperly dismissed his counterclaims for breach of contract, predatory lending, commercial coercion, specific performance, and bad faith in violation of fiduciary duty. Willett treads perilously close to failing to develop a legitimate argument on this point. *See* ***Rock Lake Estates Unit Owners Ass'n v. Township of Lake Mills***, 195 Wis. 2d 348, 369, 536 N.W.2d 415 (Ct. App. 1995) (courts need not consider undeveloped arguments).

¶20 To the extent we can draw any legal analysis from the morass of procedural facts contained in his brief, Willett appears to argue that the court improperly dismissed his counterclaims because Security Bank did not request summary judgment. The record does not support this claim. Security Bank's motion broadly requested summary judgment and was not restricted to the original claim. Further, Security Bank's reply brief in support of its motion specifically demanded summary judgment on Willett's counterclaims "because [Willett] has failed to support his counterclaims with any evidentiary support in proper affidavit form."

¶21 In any event, Willett has not identified what, if any, genuine issues of material fact exist regarding his counterclaims, nor where the supporting evidence is located in the record. We will not abandon our neutrality to develop arguments for a party. ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.

By the Court.—Judgment affirmed.

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