

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

SEPTEMBER 12, 1995

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

NOTICE

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No. 95-0119

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**AGRIBANK, FCB, A FEDERALLY
CHARTERED INSTRUMENTALITY,
F/K/A FARM CREDIT BANK
OF ST. PAUL, F/K/A THE
FEDERAL LAND BANK OF ST. PAUL,**

Plaintiff-Respondent,

v.

**RONALD MALUEG
AND LESLIE MALUEG,**

Defendants-Appellants.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JAMES T. BAYORGEON, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. Ronald Malueg and Leslie Malueg appeal a judgment of foreclosure, a personal judgment and an order dismissing Ronald Malueg's counterclaim. The circuit court granted AgriBank a judgment of foreclosure on property owned by Leslie to satisfy a debt Ronald owed to

AgriBank, and entered a personal judgment against Ronald in the amount of \$16,791.39. The court also denied Ronald's counterclaim that AgriBank violated §§ 428.103(1)(c) and (e), STATS. The issues are whether (1) the mortgage Leslie signed is enforceable, (2) \$16,791.39 was the proper amount of the judgment against Ronald and (3) AgriBank violated the named subsections of ch. 428.

We conclude that the mortgage is enforceable, \$16,791.39 is the proper amount of the judgment and therefore affirm those parts of the judgment. However, we conclude that AgriBank violated § 428.103(1)(c), STATS., and remand to determine damages. Finally, we conclude that the case must be remanded to determine whether AgriBank violated § 428.103(1)(e), STATS.

Ronald received a loan of \$23,000 from AgriBank in 1982 and used the loan proceeds as a down payment for a land contract purchase. Ronald's loan was secured by property owned by his parents, Leslie and Margaret.

Ronald signed the note, but not the mortgage on his parents' property, and his parents signed the mortgage, but not the note. However, both the note and the mortgage had the same loan number, and the note recites at the top, "Secured by a mortgage dated January 20, 1982," the date of Ronald's note.

Ronald defaulted on his payments to AgriBank in 1994. Pursuant to the Agricultural Act of 1987, AgriBank sent written notice to Ronald, with a copy to Leslie, informing them that they had forty-eight days to submit a restructure proposal on the debt. AgriBank did not receive any response to its notice, and it sent an acceleration notification on March 2, 1994, demanding payment in full on the loan.

Ronald responded to this acceleration letter by requesting an extension of time to restructure, and Leslie phoned AgriBank to discuss the matter. AgriBank responded to the extension request in a March 21, 1994, letter by setting forth conditions for the reinstatement of the loan. These conditions required Leslie to become personally obligated on the loan and required payment of approximately \$2,000 in reinstatement fees. AgriBank also informed the Maluegs that by consenting to restructure, they would avoid legal

costs of approximately \$3,000 for the foreclosure. The Maluegs refused AgriBank's reinstatement offer.

AgriBank commenced a foreclosure action on Leslie's property and demanded a personal judgment against Ronald.¹ The Maluegs answered by claiming that the mortgage was invalid, and counterclaimed by alleging that AgriBank had violated §§ 428.103(1)(c)² and (e), STATS., by asserting in its March 21 letter that the Maluegs would be responsible for attorney fees.

The circuit court granted AgriBank a judgment of foreclosure, holding that parol evidence surrounding the signing of the note and mortgage established that the parties intended Leslie's mortgage to secure the note. Next, the circuit court entered a personal judgment against Ronald for \$16,791.39. Finally, the circuit court denied Ronald's counterclaim that AgriBank violated § 428.103(1)(e), STATS., because it did not represent the \$2,000 fees to be attorney fees and found a violation of § 427.104(1)(j), STATS., but did not find any damages.

CLAIM THAT THE MORTGAGE IS INVALID

The Maluegs first claim that the mortgage on Leslie's land is invalid. They offer three arguments to support their claim: (1) Leslie received no consideration for signing the mortgage; (2) if we construe the mortgage as a security agreement for Ronald's debt, § 241.02(1)(b), STATS., invalidates the mortgage because the mortgage itself did not clearly identify the obligation

¹ Agribank's complaint originally named both Leslie and Margaret Malueg as defendants. Agribank amended the complaint, dropping Margaret as a defendant because she passed away in March 1994 and her share of the mortgaged property passed to Leslie, the surviving joint tenant.

² The Maluegs' counterclaim alleged that AgriBank had violated § 427.104(1)(j), STATS. Section 428.103(1)(c), STATS., incorporates the prohibitions of § 472.104(1)(a) to (L), STATS., by reference.

owed; and (3) § 422.305(1), STATS.,³ invalidates the mortgage because Leslie did not receive a copy of the promissory note signed by Ronald.

³ Section 422.305, STATS., provides:

Notice to obligers. (1) No natural person is obligated to assume personal liability for payment of an obligation arising out of a consumer credit transaction unless the person, in addition to signing the writing evidencing the consumer credit transaction, or a separate guaranty or similar instrument, also either receives a copy of each instrument, document, agreement and contract which is signed by the customer and which evidences the customer's obligation to pay, or signs and receives at the time of signing a separate instrument in substantially the following language:

EXPLANATION OF PERSONAL OBLIGATION

- (a) You have agreed to pay the total of payments under a consumer credit transaction between (name of customer) and.... (name of merchant) made on (date of transaction) for (description of purpose of credit, i.e. sale or loan) in the amount of \$.....
- (b) You will be liable and fully responsible for payment of the above amount even though you may not be entitled to any of the goods, services or loan furnished thereunder.
- (c) You may be sued in court for the payment of the amount due under this consumer credit transaction even though the customer named above may be working or have funds to pay the amount due.
- (d) This explanation is not the agreement under which you are obligated, and the guaranty or agreement you have executed must be consulted for the exact terms of your obligations.
- (e) You are entitled now, or at any time, to one free copy of any document you sign evidencing this transaction.
- (f) The undersigned acknowledges receipt of an exact copy of this notice.
.... (Signature)

Section 428.103(1)(b), STATS., provides:

Any cosigner, other than the spouse of the customer, shall be given a notice substantially the same as that required by s. 422.305, and the cosigner shall be entitled to a copy of any document evidencing the obligation to pay the debt.

A determination whether a mortgage contract is ambiguous is a question of law that we consider de novo. See *Lamb v. Manning*, 145 Wis.2d 619, 627, 427 N.W.2d 437, 441 (Ct. App. 1988). However, after finding ambiguity, construction of a contract using parol evidence presents a question of fact. *Welter v. Singer*, 126 Wis.2d 242, 248, 376 N.W.2d 84, 86 (Ct. App. 1985). We accept the trial court's findings of fact unless they are clearly erroneous. Section 805.17(2), STATS.

The Maluegs argue that Leslie received no consideration for signing the document because he did not personally receive a loan. They assert that we should not regard the loan to Ronald as consideration because the mortgage document did not refer to Ronald's loan. The Maluegs contend we should not use parol evidence to determine Leslie's intent because the mortgage is not ambiguous. See *Clark Oil & Refining Corp. v. Leistikow*, 69 Wis.2d 226, 237-38, 230 N.W.2d 736, 743 (1975).

A contract provision is ambiguous only if it is reasonably susceptible to more than one interpretation. *Garriguenc v. Love*, 67 Wis.2d 130, 135, 226 N.W.2d 414, 417 (1975). The mortgage document provides "the mortgagor shall pay to the mortgagee ... the sum loaned with interest ... according to the terms of a promissory note bearing even date herewith, or subsequent notes" (Emphasis added.) The mortgage document is ambiguous because it refers to a note, but does not specify the note or notes to which it refers. A reasonable person could interpret this mortgage's reference to "a promissory note" as referring to a subsequent note that Leslie will sign or the note Ronald signed the same day Leslie signed the mortgage. We therefore conclude that the trial court correctly used parol evidence to interpret the mortgage.

Parol evidence establishes that Leslie received consideration for signing the note consisting of Ronald receiving the loan. When Ronald initially applied for the loan, an AgriBank officer told him that AgriBank would deny his application unless Leslie pledged some land as security. Leslie agreed to do so because he had earlier mortgaged some of his land for the benefit of another son. Other relevant parol evidence includes Ronald's loan application listing the property Leslie mortgaged as security. Finally, the promissory note and the mortgage referenced one another by means of the same loan number. Because Leslie signed the mortgage to ensure AgriBank would make the loan to Ronald,

that loan constituted sufficient consideration to support the contract between Leslie and AgriBank.

Next, the Maluegs argue that the statute of frauds, § 241.02(1)(b), STATS.,⁴ invalidates the mortgage because the mortgage itself does not clearly identify the obligation owed.

We conclude that the Maluegs waived their right to assert the statute of frauds. Section 802.02(3), STATS. requires affirmative defenses, including the statute of frauds, to be raised in a responsive pleading. Neither Leslie nor Ronald raised the statute of frauds issue in any responsive pleading. Therefore, the trial court properly declined to consider the issue when it was raised for the first time at trial.⁵

Finally, the Maluegs argue that § 422.305(1), STATS., invalidates the mortgage because Leslie did not sign or receive the documentation required by that section. The trial court held that § 422.305(1) does not apply to this transaction because ch. 428, STATS., does apply.⁶ We agree.

Section 428.101(3), STATS., states that ch. 428 applies to "[l]oans made on or after November 1, 1981 by a creditor to a customer and which are

⁴ Section 241.02, STATS., provides in part:

Agreements, what must be written. (1) In the following case every agreement shall be void unless such agreement or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party charged therewith:

....

(c) Every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry.

⁵ Were we to address the Maluegs' statute of frauds argument, it would appear that AgriBank established clear and convincing equitable grounds to reform the mortgage to reflect the loan to Ronald as permitted by § 706.04(1), STATS., which provides: "The deficiency of the conveyance may be supplied by reformation in equity"

⁶ Except as noted hereafter, § 421.202(7), STATS., states that chs. 421 to 427, STATS., do not apply to transactions subject to ch. 428, STATS.

secured by a first lien real estate mortgage or equivalent security interest if the amount financed is \$25,000 or less." This subsection encompasses the transaction at issue. The record shows that AgriBank made Ronald's loan in January 1982, that the loan amount was \$23,000 and that the mortgage was a first mortgage on Leslie's land. We have determined that Leslie's mortgage secures Ronald's debt. Consequently, ch. 428 applies because this transaction meets its requirements.

THE AMOUNT OF THE JUDGMENT

Ronald argues that the trial court erred by finding the amount of the judgment to be \$16,791.39.⁷ He contends that the trial court erred in two ways: First, by including \$571.81 for an advance to Leslie to pay real estate taxes on the mortgaged property; second, by including \$984.50 for fees and costs AgriBank incurred administering the loan.

AgriBank paid \$571.81 in real estate taxes on Leslie's mortgaged land. AgriBank added the payment to the principal amount on Ronald's note based on the following clause in the promissory note: "All advances made by the holder hereof for payment of taxes, liens, judgments, assessments and insurance premiums shall be secured by and under the mortgage and shall be payable with interest from the date each advance is made." The trial court held that this contractual language allowed AgriBank to add the taxes paid to the principal balance of the note. We agree.

The advance satisfied the literal terms of the mortgage note because AgriBank lent the money for the payment of taxes. Furthermore, because the mortgaged land secured Ronald's note, logic and commercial practice⁸ dictate that AgriBank protect its collateral from the rights of superior lienors, such as taxing authorities.

⁷ This amount includes \$14,881.31 principal and \$1,910.08 interest.

⁸ JAMES B. MACDONALD & WALTER B. RAUSHENBUSH, WISCONSIN REAL ESTATE LAW 10-6 (1986).

Ronald argues that AgriBank failed to meet its burden of proof with respect to the addition of \$984.50 in fees and costs to the principal balance of the loan because AgriBank did not advance "clear and convincing evidence" to support the increase. The trial court found that the unchallenged testimony of a bank employee established the basis to add these fees and costs to the principal balance. We agree with the trial court.

A plaintiff need not prove the exact amount of damages; rather, evidence of damages is sufficient if it enables the fact finder to make a fair and reasonable approximation. *Carlson & Erickson Bldrs. v. Lampert Yards*, 190 Wis.2d 651, 674, 529 N.W.2d 905, 914 (1995). Paul Anderson, an AgriBank employee, testified that the \$984.50 addition was composed of "fees and costs" and gave an example of such a cost as an insurance policy for \$150. We conclude that the trial court's acceptance of Anderson's testimony was reasonable and affirm its decision with respect to the amount of the judgment.

COUNTERCLAIM UNDER CH. 428, STATS.

The Maluegs claim that the trial court erred by dismissing their counterclaim under § 428.103(1)(e), STATS., because AgriBank's March 21, 1994, letter contracted for attorney fees. Section 428.103(1)(e) provides:

The creditor shall not contract for or charge its attorneys fees to the customer except as follows:

1. Reasonable fees for opinions of title.
2. In foreclosure cases, 5% of the amount adjudged due the creditor; or if the dispute is settled prior to judgment, a reasonable fee based on the time, nature and extent of the work involved, but not to exceed 2-1/2% of the unpaid principal balance of the loan.

AgriBank's March 21, 1994, letter to Ronald and Leslie stated that AgriBank would be willing to reinstate Ronald's accelerated loan account if certain conditions were met, including:

You will be responsible for all fees and costs incurred by AgriBank for the reinstatement of the loan account. This is

estimated to be approximately \$2,000.00 to date. The exact amount will be determined once I receive an itemized accounting from my attorney for fees and costs to date.

The letter is unclear as to what portion, if any, of the \$2,000 constitutes attorney fees.

We must know the exact amount of the attorney fees AgriBank charged to determine whether its collection efforts fell within the exception of § 428.103(1)(e)1, STATS. AgriBank's settlement offer qualifies for the exception in § 428.103(1)(e)1 because a mortgage foreclosure action had been filed by AgriBank against Leslie and Ronald on March 14, 1994. However, the exception only covers up to 2-1/2% of the unpaid principal balance, so AgriBank qualifies for the exception only if it contracted for less than \$372.03 in attorney fees.⁹

The trial court's finding and the testimony at trial did not specify what portion of the \$2,000 was attorney fees. Paul Anderson, an AgriBank employee, testified that the \$2,000 referred to in the letter included "several hundred dollars" of attorney fees. The trial court found that \$100 and "maybe more" were attorney fees. In the same discussion, the trial court also said "[b]ut the \$2,000 I'm satisfied is not attorney fees." Due to the contradictory nature of these statements, we must remand to the trial court to find the exact amount of the attorney fees contracted for in the March 21, 1994, letter. On remand, if the court finds that AgriBank contracted for more than \$372.03 in attorney fees, it should apply § 428.103(2), STATS., to determine the amount of damages.

The Maluegs also claim that the trial court erred by denying recovery under § 428.103(1)(c)1, STATS. The trial court's application of ch. 428 to undisputed facts is a question of law that we review independently. See *Brandt v. LIRC*, 160 Wis.2d 353, 361, 466 N.W.2d 673, 676 (Ct. App. 1991).

Section 428.103(1)(c)1, STATS., incorporates the prohibitions of § 427.104(1)(a) to (L), STATS., in the context of debt collection. Section 427.104(1)(j), STATS., states that a debt collector cannot "Claim, or attempt or

⁹ The unpaid principal balance of \$14,881.31 times 2-1/2% equals \$372.03.

threaten to enforce a right with knowledge or reason to know that the right does not exist." The Maluegs claim that AgriBank violated this subsection in two different letters by threatening to charge Ronald for AgriBank's attorney fees in excess of the amount permitted under § 428.103(1)(e)1, STATS.

AgriBank's March 21, 1994, letter to the Maluegs stated: "The advantage of this proposal over the current foreclosure action is that you will save approximately \$3,000 on attorney fees" If more than one reasonable inference may be drawn from the evidence, we must accept the inference that the trial court chose to draw. *Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d 243, 250, 274 N.W.2d 647, 650 (1979). The trial court concluded that language did not constitute a threat under § 428, STATS., to charge AgriBank's attorney fees to the Maluegs, but rather suggested that the Maluegs would otherwise spend about \$3,000 on attorney fees to defend themselves. Because § 428.103, STATS., does not prohibit a debtor from paying his or her own attorney fees, the trial court found no violation. We conclude the trial court's holding with regard to the \$3,000 was not clearly erroneous.

The Maluegs claim that AgriBank also violated § 428.103(1)(c)1, STATS., in a letter dated August 10, 1993, which stated: "Depending upon when you pay current, legal fees can range from \$1,000 to \$3,000. Therefore, your delinquency amount can jump from \$180.63 to \$1,180.63 - \$3,180.63." The trial court found that this language violated § 428.103(1)(c)1, but did not award damages because it found no actual damages in the case. Based on the language in the letter, we conclude that the court did not err by finding a violation. However, we conclude that the trial court erred by failing to award damages. Section 428.103(2), STATS., does not require proof of actual damages because it provides a statutory penalty in subsec. (2)(a).¹⁰ Therefore, we remand this issue to the trial court to determine the amount of damages under subsec. (2)(a).

¹⁰ Section 428.103(2), STATS., states:

- (2) A person who commits a violation of this section is liable to the customer in an amount equal to the greater of:
 - (a) Twice the amount of the interest to be charged on the transaction, except that the liability under this subsection shall not be less than \$100 nor greater than \$1,000; or
 - (b) The actual damages, including any incidental and consequential damages, sustained by the customer by reason of the violation.

CONCLUSION

In sum, we hold that the mortgage on Leslie's land is valid and that the trial court correctly determined the amount of the personal judgment against Ronald to be \$16,791.39. However, we remand the case to the trial court to determine if AgriBank violated § 428.103(1)(e), STATS., and to determine the proper statutory penalty for AgriBank's violation of 428.103(1)(c), STATS.

By the Court. – Judgment and order affirmed in part; reversed in part and cause remanded for further proceedings. No costs on appeal.

Not recommended for publication in the official reports.