

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 2, 2012

Diane M. Fremgen
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. 2011AP1865

Cir. Ct. No. 2008CV1156

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

INDYMAC BANK, FSB,

PLAINTIFF-RESPONDENT,

v.

JAMES H. HALL AND TARA M. HALL,

DEFENDANTS-APPELLANTS,

**PSYCHOLOGY ASSOC. OF FOX VALLEY, IRWIN UNION BANK, FSB,
CLINTONVILLE LUMBER, INC., JAYENNE COMMERCIAL FINANCE
CORP., LYON FINANCIAL SERVICES, INC., FIRST NATIONAL BANK-
FOX VALLEY, H.J. MARTIN & SON, INC. AND CAPITAL CREDIT
UNION,**

DEFENDANTS.

APPEAL from an order of the circuit court for Outagamie County:
MITCHELL J. METROPULOS, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. James and Tara Hall, pro se, appeal an order denying a motion to vacate a foreclosure summary judgment. We affirm.

¶2 On November 16, 2005, a note was executed to IndyMac Bank, F.S.B.¹ The note was secured by a mortgage. The mortgagee was Mortgage Electronic Registration Systems, Inc., (“MERS”), “acting solely as a nominee for Lender and Lender’s successors and assigns.” The Halls defaulted and a foreclosure proceeding was initiated on July 7, 2008.

¶3 The Halls did not answer the complaint, nor submit affidavits or other evidence in opposition to IndyMac’s summary judgment motion. The Halls appeared at the summary judgment hearing and argued IndyBank improperly raised their payment amount. After hearing arguments, the circuit court granted summary judgment in favor of IndyMac on May 21, 2009.

¶4 On June 16, 2011, the Halls filed an emergency motion to vacate judgment and other injunctive relief, pursuant to WIS. STAT. § 806.07.² The court denied the motion. The Halls now appeal.

¶5 A circuit court has wide discretion in determining whether to grant relief from judgment under WIS. STAT. § 806.07. We review such a determination

¹ On approximately July 11, 2008, IndyMac failed and went into receivership under the Federal Deposit Insurance Corporation, and was rebranded IndyMac Federal Bank, F.S.B. On March 19, 2009, IndyMac Federal was acquired by OneWest Bank, F.S.B., a bank created for the purpose of acquiring IndyMac Federal. OneWest then entered into an agreement with the FDIC wherein it acquired IndyMac Federal. The mortgage was subsequently assigned to OneWest, the successor to IndyMac, by an assignment recorded on June 8, 2009.

² All references to the Wisconsin Statutes are to the 2009-10 version.

under the erroneous exercise of discretion standard.³ *See Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶29, 326 Wis. 2d 640, 785 N.W.2d 493. We will not reverse a discretionary decision if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision. *Id.*, ¶30. We generally look for reasons to sustain a circuit court's discretionary determination.

Id.

¶6 The Halls complain extensively about "robo-signings," fraudulent notarizations of affidavits, the "true holder" of the note, and other issues. Their arguments are somewhat difficult to follow. In addition, their briefs contain insufficient citations to the record on appeal. We generally do not consider arguments based on factual assertions that are insufficiently supported by record references. *See, e.g., Dieck v. Antigo Sch. Dist.*, 157 Wis. 2d 134, 148 n.9, 458 N.W.2d 565 (Ct. App. 1990). We could disregard the Halls' arguments on that basis alone.

¶7 Regardless, the Halls failed to file an answer in the foreclosure action, much less submit evidence in opposition to the motion for summary judgment. Evidentiary materials should have been submitted to establish disputed issues of fact. A motion for relief from judgment cannot serve as a substitute for what a party failed to timely do in the first place.

³ IndyMac uses the phrase "abuse of discretion." We have not used the phrase "abuse of discretion" since 1992, when our supreme court replaced the phrase with "erroneous exercise of discretion." *See Shirk v. Bowling, Inc.*, 2003 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375. IndyMac also violates WIS. STAT. RULE 809.19(1)(i) by referencing the Halls as "Defendants-Respondents" rather than by name.

¶8 Perhaps even more significantly, the Halls also failed to submit evidentiary facts with their motion for relief from judgment. The Halls merely appended hearsay “exhibits” to their motion without affidavits or other proper evidentiary foundation. In addition, the Halls do not develop an argument on appeal specifying why the circuit court erroneously exercised its discretion by refusing to grant relief from the judgment under WIS. STAT. § 806.07. We will not abandon our neutrality to develop arguments. *See M.C.I. Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶9 We also note that in their briefs to this court, the Halls do not even attempt to address WIS. STAT. § 806.07.⁴ Moreover, because the Halls’ motion was filed more than one year after judgment was entered, the Halls could only obtain relief under § 806.07 upon showing extraordinary circumstances under subsection (1)(h). *See State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 549-51 and n.7, 363 N.W.2d 419 (1985). The Halls do not address the subsection (h) factors relevant to the competing interests of finality of judgments and relief from unjust judgments. *See id.* at 552-53. We therefore will not address the issue further. *See Elbin*, 146 Wis. 2d at 244-45.

¶10 Finally, the Halls urge discretionary reversal under WIS. STAT. § 752.35. In order for this court to exercise its discretionary power under § 752.35, it must appear from the record that the real controversy has not been tried or that it is probable that justice has for any reason miscarried. We are not

⁴ In their emergency motion to vacate judgment filed in the circuit court, the Halls cited WIS. STAT. §§ 806.07(1)(a), (b), (c) and (h), but failed to develop an argument regarding the specific statutory factors.

convinced this court should exercise its extraordinary discretionary powers in this case.

By the Court.—Order affirmed.

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

