COURT OF APPEALS
DECISION
DATED AND FILED

November 30, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2966 **Cir. Ct. No. 2011CV26**

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

MID-WISCONSIN BANK,

PLAINTIFF-RESPONDENT,

V.

ANDREW CZAJKOWSKI AND DAVID PERBIX,

DEFENDANTS-APPELLANTS,

LISA A. BYRNE AND JOSEPH M. OBERZUT,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Ashland County: ROBERT E. EATON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Andrew Czajkowski and David Perbix appeal a summary judgment of foreclosure in favor of Mid-Wisconsin Bank. They argue

that a plethora of factual disputes relating to their numerous defenses and counterclaims preclude summary judgment. We conclude these defenses and counterclaims lack factual bases and Mid-Wisconsin is entitled to summary judgment as a matter of law. Accordingly, we affirm.

BACKGROUND

¶2 The pertinent facts are undisputed. In 2002, Mid-Wisconsin recorded a mortgage agreement for property known as "Woods Manor" in Ashland County, which had been purchased by Joseph Oberzut and Lisa Byrne. The mortgage secured several loans totaling approximately $769,000. The mortgage has been renewed at various times, most recently on January 31, 2010.

¶3 In 2008, Oberzut and Byrne sold a forty percent interest in Woods Manor to Czajkowski and Perbix. Oberzut and Byrne executed a quit claim deed and the four parties also signed a Tenancy in Common Agreement. Between 2006 and 2008, Czajkowski and Perbix made payments totaling $530,000 to Oberzut and Byrne. Mid-Wisconsin was not a signatory, but was aware of the Tenancy in Common Agreement. The bank did not receive from Oberzut and Byrne any of Czajkowski's and Perbix's payments and does not know where the funds went.[1]

[1] Czajkowski and Perbix assert that, despite Oberzut's and Byrne's repeated assurances to Mid-Wisconsin that the proceeds from the sale of the forty percent interest would be paid to the bank, Mid-Wisconsin did nothing to ensure that Oberzut and Byrne would turn over the funds. Czajkowski and Perbix do not provide a record citation for this assertion and many others. *See* WIS. STAT. RULE 809.19(1)(d) (requiring appropriate references to the record). Further, many of the record citations they do provide lack references to specific pages. "We have no duty to scour the record to review arguments unaccompanied by adequate record citation." ***Roy v. St. Lukes Med. Ctr.***, 2007 WI App 218, ¶10 n.1, 305 Wis. 2d 658, 741 N.W.2d 256.

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

¶4 Oberzut and Byrne ultimately defaulted on their loan by failing to make mortgage payments and pay real estate taxes. Mid-Wisconsin commenced this foreclosure proceeding against all four parties to the Tenancy in Common Agreement.[2] Mid-Wisconsin obtained a default judgment against Oberzut and Byrne and filed a motion for summary judgment against Czajkowski and Perbix. Czajkowski and Perbix proffered numerous defenses and counterclaims, including breach of contract, novation, breach of the covenant of good faith and fair dealing, estoppel, tortious interference with contract, and unjust enrichment. The circuit court rejected these arguments, primarily on the basis that there was no contractual privity between Czajkowski and Perbix and Mid-Wisconsin. It entered judgment for Mid-Wisconsin and ordered the property sold.

DISCUSSION

¶5 We review a grant of summary judgment de novo, applying the same methodology as the circuit court. ***Tews v. NHI, LLC***, 2010 WI 137, ¶40, 330 Wis. 2d 389, 793 N.W.2d 860. We must examine the pleadings to determine whether claims have been stated, and then determine whether any material factual issues have been presented. ***Id.***, ¶41. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***, ¶42. The purpose of summary judgment is to avoid trials when there is nothing to try. ***Id.***

[2] Mid-Wisconsin did not contend that Czajkowski and Perbix were contractually indebted to the bank; rather, Mid-Wisconsin sought to foreclose the claims of all junior interested parties. Mid-Wisconsin maintained that Czajkowski's and Perbix's rights were junior to the mortgage.

¶6 Many of Czajkowski's and Perbix's arguments—breach of contract, novation, and breach of the covenant of good faith and fair dealing—presuppose the existence of an enforceable obligation between them and Mid-Wisconsin. However, neither Czajkowski nor Perbix were parties to the original mortgage agreement or renewal signed in 2010. Mid-Wisconsin was not a party to the Tenancy in Common Agreement. In short, there is no factual basis for these arguments, as no contract has ever existed between Czajkowski and Perbix and Mid-Wisconsin.

¶7 Czajkowski and Perbix also assert Mid-Wisconsin has tortiously interfered with the Tenancy in Common Agreement and should be equitably estopped from enforcing the mortgage. In essence, Czajkowski and Perbix maintain that Mid-Wisconsin's "wrongful" conduct consisted of renewing the mortgage in 2010 without obtaining their consent. This argument is a nonstarter. Again, Czajkowski and Perbix seek to hold Mid-Wisconsin to the terms of the Tenancy in Common Agreement, which it never signed. "[O]ne cannot enforce a contract against an entity that is not a party to it." ***Maciolek v. City of Milwaukee Employes' Ret. Sys. Annuity & Pension Bd.***, 2006 WI 10, ¶22, 288 Wis. 2d 62, 709 N.W.2d 360.

¶8 As for unjust enrichment, Czajkowski and Perbix contend Mid-Wisconsin "received a significant cash benefit conferred upon it by [their] infusion of $530,000 in the mortgage property[.]" However, it is undisputed Mid-Wisconsin never received these payments from Oberzut and Byrne. Czajkowski and Perbix concede the point by acknowledging that Oberzut and Byrne failed to inform Mid-Wisconsin of the payments or remit them to the bank.

¶9 At bottom, Czajkowski's and Perbix's brief presents myriad legal theories loosely tethered to one central premise: that their forty percent interest in Woods Manor should not be extinguished because they simply did not know about Mid-Wisconsin's mortgage at the time of their purchase. However, this is not a valid defense to foreclosure. There exists a conclusive presumption that a purchaser knows every conveyance of property recorded which affects the title to the property, regardless whether the purchaser examined the public records. ***Bump v. Dahl***, 26 Wis. 2d 607, 615, 133 N.W.2d 295 (1965). Mid-Wisconsin was the first to record its interest in the property, six years before Czajkowski's and Perbix's interests arose. Under Wisconsin's race-notice statute, Czajkowski and Perbix had notice of the bank's prior mortgage as a matter of law and, therefore, have no remedy against the bank. *See* WIS. STAT. § 706.08(1)(a).

By the Court.—Judgment affirmed.

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