COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1064 **Cir. Ct. No. 2009CV5408**

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

CITIMORTGAGE, INC.,

PLAINTIFF-RESPONDENT,

V.

RICHARD BURRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Richard Burris appeals a foreclosure judgment. He argues that the circuit court erred by granting summary judgment because CitiMortgage's summary judgment motion was late, there are disputed issues of

material fact, and the summary judgment procedure is unconstitutional. We reject his arguments, and affirm the judgment.

¶2 Burris first argues that CitiMortgage's motion for summary judgment was filed late under WIS. STAT. § 802.08(1) (2011-12),[1] which provides that "[a] party may, within 8 months of the filing of a summons and complaint or within the time set in a scheduling order under s. 802.10, move for summary judgment." The summons and complaint were filed October 23, 2009. Service by publication was completed January 26, 2010. Burris's request for a copy of the complaint was received February 24, 2010, and his answer was filed March 25, 2010. The motion for summary judgment was filed July 14, 2010. In response to Burris's claim that the motion was untimely, CitiMortgage asked the circuit court to make a discretionary scheduling order allowing the motion.

¶3 Burris cites no legal authority that the time to file the motion for summary judgment is mandatory and that the late filing precludes consideration of the motion. Additionally, although WIS. STAT. § 801.15(2)(a) requires a showing of excusable neglect when a motion to enlarge the time to act is filed after expiration of the specified time, Burris did not raise the requirement of excusable neglect in the circuit court, and does not raise it in this court. We will not develop that argument for him.

¶4 It is sufficient to observe that "[t]rial courts have the inherent power to control their dockets to achieve economy of time and effort." ***Lentz v. Young***, 195 Wis. 2d 457, 465, 536 N.W.2d 451 (Ct. App. 1995). The purpose of the time

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

limitation for summary judgment motions is to prevent the use of the motion for purposes of delay. ***First Nat'l Bank of Columbus v. Hansen***, 84 Wis. 2d 422, 427-28, 267 N.W.2d 367 (1978). At the second hearing held on the motion for summary judgment, the circuit court allowed the summary judgment motion to be filed and found that no one was prejudiced by the late filing. "[W]here a belated motion for summary judgment is predicated on a legal issue totally dispositive of the case, the motion does not cause delay but rather expedites the disposition of the litigation, and the trial court does not abuse its discretion in permitting it." ***Id.*** at 428. There was no undue delay between the filing of Burris's answer and the filing of the motion for summary judgment. Additionally, at the second summary judgment hearing, Burris asked the court for more time to sort things out and seek mediation. The motion remained pending to give Burris the time he sought. The circuit court properly exercised its discretion in allowing the late motion.[2]

¶5 Using the same summary judgment methodology as the circuit court, we review a grant of summary judgment de novo. ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** We examine the moving party's submissions to determine if a prima facie case for summary

[2] Even considering the circuit court's ruling as an implicit finding of excusable neglect, the circumstances support such finding. Relief under WIS. STAT. § 801.15(2)(a) is appropriate if the court finds reasonable grounds for noncompliance with the statutory time period, that is, excusable neglect, and the interests of justice are served by the enlargement of time in that the party seeking an enlargement of time has acted in good faith and that the opposing party is not prejudiced. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982). The delay in service and filing of the answer provide reasonable grounds for noncompliance. Burris was given more time, and was not prejudiced.

judgment is established. ***Id.*** If so, we examine the opposing party's submissions to determine if material facts are put in dispute. ***Id.***

> If there are disputed issues of material fact, a grant of summary judgment is inappropriate and must be reversed so that the disputes can be resolved by a factfinder after trial. The alleged factual dispute, however, must concern a fact that affects the resolution of the controversy, and the evidence must be such that a reasonable jury could return a verdict for the nonmoving party.

Clay v. Horton Mfg. Co., 172 Wis. 2d 349, 353-54, 493 N.W.2d 379 (Ct. App. 1992) (citations omitted).

¶6 In support of its motion for summary judgment, CitiMortgage submitted an affidavit from a CitiMortgage employee who is the custodian of business records and whose responsibility it is to possess and control the accounting and other mortgage loan documents related to Burris's mortgage that were created, kept, and maintained in the ordinary course of business. The affidavit stated that it was based on personal inspection of the records and personal knowledge of how the records are created, kept, and maintained. The affidavit averred: that CitiMortgage was assigned Burris's mortgage; that Burris was in default by failing to make payments after February 1, 2008; and that an identified amount was due on the mortgage. In his answer to the complaint, Burris admitted he signed the promissory note and mortgage. Thus, CitiMortgage established a prima facie case for foreclosure.

¶7 Burris contends that CitiMortgage did not make a prima facie case for summary judgment. He points out that the evidence, and the inferences therefrom, must be viewed in the light most favorable to the party opposing the motion. ***Kraemer Bros., Inc. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979). Burris then vaguely asserts that reasonable factual

inferences can be drawn in his favor from CitiMortgage's proof. We disagree. CitiMortgage presented proof of facts permitting only one meaning—that Burris defaulted on a note owned by CitiMortgage.

¶8 Burris also challenges the CitiMortgage affidavits as not being based on personal knowledge and being self-serving, incomprehensible, and not truthful.[3] In support, he cites only the conclusory allegations, contained in his circuit court brief in opposition to the summary judgment motion, that the affidavits are deficient. He does not point to any sworn evidence disputing those affidavits.[4] The prima facie case is not defeated by his conclusory allegations.

¶9 We turn to consider whether Burris's submission in opposition to the motion for summary judgment raised any genuine issue of disputed fact that would preclude summary judgment. Burris's own affidavit in opposition to summary judgment sets forth the reasons for his inability to make payments, how he attempted to communicate with CitiMortgage to work out a modification, that in December 2008 he was approved for a loan modification and he made the required "good faith" payment, that he was informed he did not need to make any payments

[3] For the first time in his reply brief, Burris cites ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶11, 324 Wis. 2d 180, 781 N.W.2d 503, and suggests that the business records attached to CitiMortgage's affidavit are inadmissible hearsay. Generally, we do not address issues raised for the first time in a reply brief. ***Schaeffer v. State Personnel Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). However, we conduct a de novo review of the summary judgment submissions, and are satisfied that the affidavit submitting the records does not suffer from the infirmity found in ***Palisades***.

[4] Referring to literature and internet search results outside of the record, Burris attempts to impugn the authenticity of one of the signatures on the assignment of mortgage provided by CitiMortgage. This does not serve to invalidate the affidavit establishing CitiMortgage's ownership of the mortgage and Burris's default. Similarly, Burris's discussion of the high volume of foreclosure litigation handled by CitiMortgage's counsel is not material to whether summary judgment was properly granted. Burris also cites to and discusses an unpublished per curiam decision of the Wisconsin Court of Appeals in violation of WIS. STAT. RULE 809.23(3).

until the new arrangements could be determined, and that he never received the notice of default and thirty-day right to cure letter CitiMortgage included with its motion for summary judgment. With respect to payments, Burris merely asserted that payments he made "have either been misapplied, held in suspension, or returned to me uncashed," that "I dispute the amounts and dates alleged" in CitiMortgage's affidavit, and "I deny many of the claims and dispute many of the alleged material facts in the motion for summary judgment." Although Burris's affidavit indicated that he sought a loan modification, the affidavit failed to establish that such a modification was ever completed. An agreement to agree is not enforceable. ***Witt v. Realist, Inc.***, 18 Wis. 2d 282, 298, 118 N.W.2d 85 (1962). Burris's affidavit was inadequate to establish any evidentiary fact that disputed proof of nonpayment.[5] The opponent of a summary judgment motion may not rest on mere denials but must affirmatively counter with evidentiary materials demonstrating a factual dispute. ***Dawson v. Goldammer***, 2006 WI App 158, ¶¶30-31, 295 Wis. 2d 728, 722 N.W.2d 106. Arguing the equities of the situation, *i.e.*, Burris's attempt at modification and his frustration in trying to get it done, does nothing to dispute CitiMortgage's entitlement to judgment based on the existing default. Summary judgment was properly granted.[6]

[5] The unsworn statement Burris filed with his motion for reconsideration also did not include any factual averments.

[6] Referencing his motion for reconsideration, Burris complains that the circuit court did not follow proper procedures and failed to set forth adequate reasoning that CitiMortgage had proven a prima facie case. Burris's complaints that the circuit court did not follow proper procedures in granting summary judgment is of no consequence since this court's review is de novo. Burris's discussion in his appellant's brief of the factors applicable to a circuit court's discretionary determination on a motion for relief from judgment under WIS. STAT. § 806.07 is similarly misplaced. Burris did not seek relief under § 806.07, and the granting of summary judgment is not a discretionary decision.

¶10 Burris's final argument is that granting a judgment of foreclosure without any evidentiary hearing is against the spirit of the Seventh Amendment to the United States Constitution which preserves the right of trial by jury.[7] *See* U.S. CONST. amend. VII. Burris raises this issue for the first time on appeal, and we need not address it. ***Finch v. Southside Lincoln-Mercury, Inc.***, 2004 WI App 110, ¶42, 274 Wis. 2d 719, 685 N.W.2d 154. Additionally, his reliance on the analysis set forth in Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 143 (2007), is unpersuasive since the essay discusses summary judgment as used by federal courts and under the federal rules of procedure, and Burris does not explain how the analysis applies to the Wisconsin statute permitting summary judgment. Furthermore, no constitutional infirmity exists under Wisconsin's well-developed summary judgment law because circuit courts are required to deny summary judgment when "material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance." ***Grams v. Boss***, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980). The circuit court does not displace the jury as a fact finder because it does not decide issues of fact but only decides whether there is a genuine issue of fact entitling a party to a trial. *See* ***id.*** at 338.

¶11 To the extent Burris argues that summary judgment is unconstitutional as applied to him, his argument is not developed and eventually morphs into another claim that there were disputed material facts here and

[7] In the introduction section to his appellant's brief, Burris contends that summary judgment was improper because it was entered without "scrutiny ensuring the constitutional protections of property ownership without risking it being taken away without due process." However, he does not argue a due process violation in the argument section of his brief mounting a constitutional challenge to the use of summary judgment.

summary judgment was, therefore, inappropriate. We have already concluded that summary judgment was proper.

By the Court.—Judgment affirmed.

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