COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2011AP2927
2012AP1161

Cir. Ct. Nos. 2009CV818

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

U.S. BANK, N.A.,

PLAINTIFF-RESPONDENT,

V.

CRAIG W. JOHNSON AND SUSAN M. JOHNSON,

DEFENDANTS-APPELLANTS,

FIRST STATE BANK OF WYOMING,

DEFENDANT.

APPEALS from orders of the circuit court for Polk County: ERIC J. LUNDELL, Judge. *Appeal dismissed; order affirmed.*

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

¶1 PER CURIAM. Craig and Susan Johnson appeal an order denying their motion to vacate a foreclosure judgment. In a separate appeal, the Johnsons contend the circuit court erred by denying their motion for post-judgment discovery. U.S. Bank, N.A., argues the order denying the Johnsons' motion to vacate is not appealable because the motion merely relitigated issues that were disposed of in the previous judgment. U.S. Bank also argues the circuit court properly exercised its discretion by denying the Johnsons' motion for post-judgment discovery. We agree on both counts. We therefore dismiss the Johnsons' appeal from the order denying their motion to vacate, and we affirm the order denying the Johnsons' post-judgment discovery motion.

BACKGROUND[1]

¶2 U.S. Bank filed a summons and complaint on October 19, 2009, seeking a foreclosure judgment against the Johnsons. The complaint alleged that the Johnsons had executed a note and mortgage in favor of Community National Bank, and Community National Bank subsequently assigned the mortgage to Firststar Bank, N.A. The complaint further alleged that Firststar Bank is now known as U.S. Bank. Finally, the complaint alleged that the Johnsons had defaulted on their loan and owed U.S. Bank $236,326.17.

[1] U.S. Bank's brief contains no citations to the record; instead, U.S. Bank cites only to the Johnsons' appendix. We admonish U.S. Bank that WIS. STAT. RULES 809.19(1)(d) and (e) require appropriate citations to the record on appeal, and references to a brief's appendix do not qualify. *See* ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322.

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

¶3 Attached to the complaint were copies of a note and mortgage, which were signed by the Johnsons and listed Community National Bank as the lender. The last page of the note contains an undated endorsement from Community National Bank to "U.S. Bank N.A." An "Assignment of Mortgage" from Community National Bank to "Firststar Bank, N.A." was also attached to the complaint.

¶4 On September 1, 2010, U.S. Bank moved for summary judgment. In support of its motion, U.S. Bank submitted an affidavit of Maria Lawrence, who averred that she is an employee of U.S. Bank and is the "[c]ustodian of the records kept in the ordinary course of business in the name(s) of CRAIG W. JOHNSON and SUSAN M. JOHNSON." Lawrence averred that she "reviewed all the records for this account" and "ma[de] this Affidavit based upon personal knowledge." She further averred that: (1) the Johnsons executed a note and mortgage in favor of Community National Bank; (2) Community National Bank assigned the mortgage to Firststar Bank; (3) Firststar Bank is now known as U.S. Bank; and (4) the Johnsons defaulted on the note by failing to make the required monthly payments.

¶5 In response, the Johnsons, pro se, sent the circuit court a newspaper article suggesting "that numerous lenders have used inaccurate or incomplete documents to remove delinquent owners from their houses." The Johnsons stated, "[W]e'd like to know whether Maria Lawrence … does indeed have 'personal knowledge' of our account." In addition, they asked "to see evidence that [U.S. Bank] actually holds title on the [mortgaged] property. Not the mortgage papers, but the actual title."

¶6 The Johnsons also moved to dismiss U.S. Bank's complaint. They contended U.S. Bank had failed to prove it owned their note, and, as a result, it did not have standing to seek foreclosure. They also repeated their allegation that Lawrence's affidavit was "robo-signed," and they asserted that some of the mortgage documents submitted by U.S. Bank were "fabricated after the fact." U.S. Bank disputed these allegations in a response filed February 22, 2011.

¶7 The circuit court subsequently granted U.S. Bank summary judgment. The court concluded there was no genuine issue of material fact regarding U.S. Bank's ownership of the note and mortgage. The court also stated it was undisputed that the Johnsons were in default. Consequently, the court entered a foreclosure judgment in favor of U.S. Bank on May 4, 2011.

¶8 The Johnsons did not appeal the foreclosure judgment. However, on June 9, 2011, now represented by counsel, they moved the circuit court to vacate the judgment pursuant to WIS. STAT. § 806.07(1). Again, the Johnsons argued U.S. Bank had not established that it owned the note and mortgage. Specifically, they alleged the relevant averments in Lawrence's affidavit were inadmissible because they were not based on personal knowledge. They also alleged the mortgage documents submitted by U.S. Bank were "fraudulent."

¶9 The circuit court denied the Johnsons' motion to vacate on September 28, 2011, reasoning that the motion "simply repackage[ed] the same arguments previously addressed by the Court in its summary judgment decision." The court also concluded that Lawrence's affidavit was based on personal knowledge, and that, even without the affidavit, "U.S. Bank submitted enough admissible evidence to establish that it not only owned the note but that the

Johnsons were in default." The Johnsons filed a notice of appeal from the court's September 28 order.

¶10 On December 15, 2011, U.S. Bank assigned its interest in the foreclosure judgment to the Federal Home Loan Mortgage Corporation (Freddie Mac) for "One Dollar ($1.00) and other valuable consideration." On the same date, Freddie Mac purchased the mortgaged property at a sheriff's sale. In light of the assignment to Freddie Mac, the Johnsons asked the court to delay confirming the sheriff's sale and to allow the Johnsons to "conduct discovery into the relationship between U.S. Bank and [Freddie Mac]." Shortly thereafter, the Johnsons served requests for admissions, interrogatories, and requests for production of documents on U.S. Bank.

¶11 U.S. Bank objected to the Johnsons' discovery requests, arguing they were outside the scope of discovery permitted by WIS. STAT. § 804.01(2). In response, the Johnsons asked the circuit court to exercise its equitable authority to allow post-judgment discovery. Following a hearing, the court concluded the Johnsons' requested discovery was not permissible under § 804.01(2). The court therefore denied the Johnsons' motion and confirmed the sheriff's sale. The Johnsons then filed a second notice of appeal from the order denying their discovery motion.

DISCUSSION

¶12 In their first appeal, the Johnsons argue the circuit court erred by denying their motion to vacate the foreclosure judgment. However, the order denying that motion is not an appealable order. It is black-letter law in Wisconsin that "there is no right to appeal from an order or judgment entered on a motion to modify or vacate a judgment where the only issues raised were disposed of in the

prior order or judgment." *See* ***La Crosse Trust Co. v. Bluske***, 99 Wis. 2d 427, 429, 299 N.W.2d 302 (Ct. App. 1980). This rule applies to motions brought under WIS. STAT. § 806.07(1). *See* ***Shuput v. Lauer***, 109 Wis. 2d 164, 176-77, 325 N.W.2d 321 (1982). Although the effect of the rule is sometimes harsh, "the policy behind the rule is to prevent a party from extending the time to appeal by filing a motion [to vacate]." ***La Crosse Trust***, 99 Wis. 2d at 429.

¶13 The only issues raised in the Johnsons' motion to vacate had already been disposed of on summary judgment. Both the motion to vacate and the Johnsons' summary judgment filings argued that: (1) U.S. Bank failed to prove it owned the note and mortgage; (2) Lawrence's affidavit was not based on personal knowledge; and (3) U.S. Bank falsified the mortgage documents it submitted to the court. The circuit court rejected these arguments in its summary judgment decision. The motion to vacate did not raise any additional arguments. Because the motion to vacate only raised issues that had been disposed of on summary judgment, the order denying the motion is not an appealable order. *See* ***id.*** We therefore dismiss the Johnsons' appeal from the order denying their motion to vacate.

¶14 In their second appeal, the Johnsons argue the circuit court erred by denying their motion for post-judgment discovery. A circuit court's decision to permit or prohibit discovery is reviewed for an erroneous exercise of discretion. ***Vincent & Vincent, Inc. v. Spacek***, 102 Wis. 2d 266, 270, 306 N.W.2d 85 (Ct. App. 1981). A court erroneously exercises its discretion by making an error of law or failing to base its decision on the facts of record. ***Bethke v. Auto-Owners Ins. Co.***, 2013 WI 16, ¶16, 345 Wis. 2d 533, 825 N.W.2d 482. The Johnsons argue the circuit court made an error of law when it concluded that WIS. STAT. § 804.01(2) did not permit them to conduct post-judgment discovery. The

application of a statute to undisputed facts presents an issue of law that we review independently. ***Ansani v. Cascade Mountain, Inc.***, 223 Wis. 2d 39, 45, 588 N.W.2d 321 (Ct. App. 1998).

¶15 WISCONSIN STAT. § 804.01(2)(a) states, in pertinent part, "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]" U.S. Bank contends that the Johnsons' post-judgment discovery requests were not relevant to the subject matter of a pending action. We agree.

¶16 The Johnsons' discovery requests were aimed at unearthing evidence that U.S. Bank did not actually own the note and mortgage. However, that issue was resolved by the foreclosure judgment and was no longer pending at the time the Johnsons filed their requests. A judgment of foreclosure "determines the rights of the parties and disposes of the entire matter in litigation[.]" ***Hackmann v. Behm***, 207 Wis. 2d 437, 443, 558 N.W.2d 905 (Ct. App. 1996). While the circuit court retains jurisdiction over the case after the foreclosure judgment is entered, the court's only role is to oversee the "statutory proceedings [that] … carry into effect and enforce the judgment of foreclosure and sale." ***Id.*** Thus, after a foreclosure judgment has been entered, the substantive rights of the parties—including the ownership of the note—are no longer at issue. Consequently, post-judgment discovery requests that relate to the ownership of the note are not relevant to the subject matter of a pending action. As a result, the Johnsons' post-judgment discovery requests were not permissible under WIS. STAT. § 804.01(2).

¶17 The Johnsons nevertheless argue the circuit court should have exercised its equitable authority to permit post-judgment discovery. *See* ***GMAC***

Mortg. Corp. v. Gisvold, 215 Wis. 2d 459, 480, 572 N.W.2d 466 (1998) ("Foreclosure proceedings are equitable in nature, and the circuit court has the equitable authority to exercise discretion throughout the proceedings."). But, as U.S. Bank points out, the Johnsons offered no convincing reason for the court to exercise its discretion in that way. The Johnsons merely speculated, based on U.S. Bank's assignment of the foreclosure judgment to Freddie Mac, that Freddie Mac had always been the note's true owner. However, U.S. Bank presented the circuit court with an alternative explanation for the assignment: that Freddie Mac insured the loan and was therefore ultimately responsible for the loss. Moreover, U.S. Bank noted that the Johnsons had ample time to conduct discovery regarding the note's ownership before the foreclosure judgment was entered, but they failed to do so. Based on U.S. Bank's assertions, the court could properly conclude that post-judgment discovery was not warranted. We therefore agree with U.S. Bank that the court properly exercised its discretion by denying the Johnsons' motion for post-judgment discovery.

By the Court.—Appeal dismissed; order affirmed.

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