COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP688 **Cir. Ct. No. 2009CV1389**

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

ONEWEST BANK, FSB, AS SERVICER FOR DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE OF THE INDYMAC INDX MORTGAGE LOAN TRUST 2004-AR8, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-AR8 UNDER THE POOLING AND SERVICING AGREEMENT DATED SEPTEMBER 1, 2004,

PLAINTIFF-RESPONDENT,

V.

DEBORAH M. SOWL AND KERRY T. SOWL,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

WELLS FARGO BANK, N.A.,

DEFENDANT,

V.

EMPOWERED FINANCIAL GROUP, INC. P/K/A FIRST FINANCIAL MORTGAGE, INC. AND PETER M. CYMBALAK,

THIRD-PARTY DEFENDANTS.

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

Before Higginbotham, Sherman and Kloppenburg, JJ.

¶1 HIGGINBOTHAM, J. Deborah M. Sowl and Kerry T. Sowl appeal a circuit court judgment granting summary judgment of foreclosure to OneWest Bank, FSB (OneWest). The Sowls argue that the circuit court erred in granting summary judgment because OneWest failed to make a prima facie case that it has the right to enforce the note entered into by the Sowls. For the reasons we explain below, we affirm.

BACKGROUND

¶2 In August 2004, Deborah Sowls and Kerry Sowls executed a promissory note payable to IndyMac Bank, FSB. The note was secured by a mortgage serviced by the Mortgage Electronic Registration Systems, Inc. (MERS) on their residence. IndyMac Bank, FSB failed and was taken over by the federal government and renamed IndyMac Federal Bank, FSB (IndyMac Federal). IndyMac Federal acquired the Sowls' note and mortgage by assignment of note and mortgage dated March 18, 2009.

¶3 The Sowls ceased making the required payments on the note and IndyMac Federal brought a foreclosure action against the Sowls, alleging that the Sowls defaulted on their obligations under the note. A copy of the mortgage was

attached to the complaint; a copy of the note was not attached. The Sowls timely answered, asserting affirmative defenses and counterclaims.[1]

¶4 During the ensuing months, IndyMac Federal filed five motions to substitute OneWest as the plaintiff and for summary judgment of foreclosure. In response to a number of missteps by IndyMac Federal in its attempts to obtain a judgment of foreclosure on behalf of OneWest, as the substituted plaintiff, the circuit court afforded IndyMac Federal a number of opportunities to file additional motions with the necessary evidence establishing that OneWest was the proper plaintiff and that it had the right, as the holder of the note, to enforce the note. The Sowls filed response briefs to all of IndyMac Federal's submissions and participated in the June 28, 2010 hearing held on IndyMac Federal's fourth motion to substitute OneWest as the plaintiff and for summary judgment of foreclosure.

¶5 The circuit court granted IndyMac Federal's fifth motion to substitute OneWest as the plaintiff based on IndyMac Federal's unchallenged evidentiary submissions that OneWest possessed the note, which was endorsed in blank. The circuit court determined that OneWest, as the bearer of the note, had the right to enforce it.[2] The court also concluded that OneWest had established a prima facie case for summary judgment based on the note signed by the Sowls and the undisputed fact that the Sowls had defaulted on the loan. Turning to the

[1] The Sowls also filed a third-party complaint against the mortgage brokers involved in this transaction. Those parties are not part of this appeal.

[2] In support of its fifth motion to substitute OneWest as the plaintiff and its motion for summary judgment, IndyMac Federal attached an affidavit from Charles Boyle, assistant vice president of OneWest. In that affidavit, Boyle averred that, as an employee of OneWest, he was familiar with and had access to the financial records concerning the mortgage at issue in this case; that he had access to the records of the Sowls' mortgage; that a copy of the original note was attached to his affidavit; and that OneWest possessed the original loan documents.

Sowls' defenses and counterclaims, the court concluded that the Sowls' evidentiary submissions were largely conclusory and did not support their alleged defenses and counterclaims, and dismissed the Sowls' defenses and counterclaims on those grounds. The court then granted summary judgment of foreclosure to OneWest. The court concluded, based on Boyle's affidavit and attachments, that OneWest possessed the note, and, as the bearer of the note, which was endorsed in blank, had the right to enforce it. The Sowls appeal.[3] Additional facts, as necessary, are set forth in the discussion section.

DISCUSSION

¶6 In this case, we review the circuit court's judgment granting summary judgment in favor of OneWest. We review a grant of summary judgment de novo, applying the same methodology as the circuit court. ***State v. Bobby G.***, 2007 WI 77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81. Summary judgment is appropriate when the affidavits and other submissions show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2011-12).[4] We first examine the moving papers and documents supporting the motion to determine whether the moving party has made a prima facie case. ***Kraemer Bros., Inc.. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 566, 278 N.W.2d 857 (1979). If those submissions make a prima facie case for summary judgment, the opposing party must then set forth facts demonstrating a genuine issue for trial. ***Id.*** at 567.

[3] The Sowls do not appeal that part of the court's judgment dismissing their counterclaims.

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

"[W]e draw all reasonable inferences from the evidence in the light most favorable to the non-moving party." ***Burbank Grease Servs., LLC v. Sokolowski***, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781.

¶7 On appeal, the Sowls contend that the circuit court erred in granting summary judgment in favor of OneWest. The Sowls first argue that the bank failed to make a prima facie case that the account statements attached to Boyle's affidavit were admissible under WIS. STAT. § 908.03(6), an exception to the hearsay rules regarding records of regularly conducted activity. In support, the Sowls rely on our decision in ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶15, 324 Wis. 2d 180, 781 N.W.2d 503, where we held that the averments made in the affidavit at issue in that case did not show that the affiant was qualified to testify that: "(1) the records were made at or near the time by, or from information transmitted by, a person with knowledge; and (2) this was done in the course of a regularly conducted activity." We explained in ***Palisades*** that in order to be qualified to testify as to the above two points, the affiant "must have personal knowledge of how the account statements were prepared and that they were prepared in the ordinary course of [] business." ***Id.***, ¶21. Applying our reasoning in ***Palisades*** to Boyle's affidavit here, the Sowls argue that Boyle has not established the admissibility of the payment records under § 908.03(6), and therefore the records may not be considered as evidence of the Sowls' alleged default.

¶8 It also appears that the Sowls may be arguing that the payment records were never properly authenticated under WIS. STAT. § 909.01, which we refer to as the authentication statute, and therefore the circuit court erroneously exercised its discretion when it considered the payment records. We understand

the Sowls to be arguing that the payment records were inadmissible because they were not properly authenticated.

¶9 The Sowls' arguments suffer from two fatal flaws. First, we observe that the Sowls did not raise either argument in the circuit court, although they had ample opportunity to do so. As we have indicated, IndyMac Federal filed five motions to substitute OneWest as the plaintiff and for summary judgment of foreclosure. The Sowls responded to each motion with briefing. We have closely scrutinized each of the Sowls' submissions and the transcript of the June 28, 2010 hearing on IndyMac Federal's fourth motion and find no indication that the Sowls raised any of the above arguments concerning the application of the hearsay exception regarding records of regularly conducted activity, WIS. STAT. § 908.03(6), or the authentication statute, WIS. STAT. § 909.01, to the payment records. While the Sowls did argue in their submissions responding to IndyMac Federal's motions that no evidence was submitted by IndyMac Federal establishing that OneWest held the note and the mortgage, the Sowls did not raise any objection to the admissibility of the payment records on any grounds, let alone on the grounds they argue here.

¶10 Generally, we do not consider issues raised for the first time on appeal. ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838. We apply this rule when the circuit court has not had the opportunity to "pass" on the issue. ***Hopper v. City of Madison***, 79 Wis. 2d 120, 137, 256 N.W.2d 139 (1977). Here, the circuit court would have had ample opportunity to "pass" on the Sowls' contentions that the payment records were inadmissible under WIS. STAT. § 908.03(6) and WIS. STAT. § 909.01, had the Sowls raised those contentions in circuit court. However, as we have explained, the Sowls had five opportunities to bring these contentions to the court's and

IndyMac Federal's attention, but they failed to do so. Had the Sowls raised these objections to the admissibility of the payment records in the circuit court, the court might have permitted IndyMac Federal to cure these alleged evidentiary problems, as the court did with the evidentiary issues the Sowls did in fact raise. However, because the Sowls failed to raise these issues in the circuit court, the court was not able to address them, and the Sowls do not provide any reason why we should address these arguments not first raised in the circuit court. We therefore conclude that the Sowls have forfeited their right to make these arguments and have them considered on appeal.

¶11 The second problem with the Sowls' payment records argument is that in affidavits submitted in support of their brief opposing IndyMac Federal's fourth motion for summary judgment, they both averred that, in 2004, they refinanced the original 2003 note with IndyMac Bank, FSB, and that, because they were unable to make the required loan payments under the note, they defaulted on the loan. We consider these averments as concessions by the Sowls that they were liable under the 2004 note and that they defaulted on the loan. The Sowls have not explained, in light of these concessions, why summary judgment of foreclosure in favor of OneWest was inappropriate.

¶12 Next, the Sowls argue that OneWest was not entitled to summary judgment because it failed to make a prima facie showing that it was entitled to enforce the note as a real party in interest. In making this argument, the Sowls appear to conflate the application of the hearsay rules, specifically WIS. STAT. § 908.03(6), with the requirements for authentication under WIS. STAT. § 909.01. As we understand their arguments, the Sowls contend that OneWest failed to authenticate a copy of the note attached to the Boyle affidavit, pursuant to § 908.03(6), "by the testimony of the custodian or other qualified witness." They

also appear to argue that, although Boyle avers that OneWest has possession of the original note, he does not aver that he examined the note to confirm that it was the original. Thus, the Sowls argue, because Boyle does not have personal knowledge of the original note, Boyle's affidavit is insufficient to authenticate the copy of the note under § 908.03(6). We reject these arguments.

¶13 As with their argument that OneWest failed to properly authenticate the payment records under WIS. STAT. § 908.03(6), the Sowls never argued in the circuit court that the note was hearsay, and that OneWest failed to authenticate the note under § 908.03(6). Because the Sowls failed to first raise this argument in the circuit court, they have forfeited the right to have this argument considered on appeal.

¶14 Nevertheless, even if the Sowls had argued that the note was hearsay and had not been properly authenticated in the circuit court, they would not have prevailed. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). A note, however, is offered for its legal effect and is not hearsay. *See* ***Lyon Financial Services, Inc. v. Fernando***, No. 2011AP222, unpublished slip op. ¶19 (WI App Nov. 10, 2011) (providing that an assignment was not hearsay because it was offered to show the legal effect of the document, namely, that the plaintiff had the legal status of assignee of the lease). In addition, the note at issue here is presumed to be authentic and authorized. *See* WIS. STAT. § 403.308(1). Accordingly, to the extent the Sowls rely on WIS. STAT. § 908.03(6) to support their argument that the circuit court erroneously exercised its discretion in concluding, based on OneWest's unchallenged evidentiary submissions, that OneWest held the note, that argument would have been rejected.

¶15 To the extent the Sowls are making a separate argument that the note has not been properly authenticated under the authentication statute, WIS. STAT. § 909.01, they have also forfeited this argument because they did not first raise that argument in circuit court. Moreover, that argument is not fully developed on appeal and therefore we do not address it. *See* ***Techworks, LLC v. Wille***, 2009 WI App 101, ¶28, 318 Wis. 2d 488, 770 N.W.2d 727 (providing that we will not address undeveloped arguments).

¶16 Finally, the Sowls argue that, to be a real party in interest, possession of the note alone is insufficient because OneWest must show that it possesses both the note and the mortgage securing the note. In support, the Sowls rely on ***Andrews v. Powers***, 35 Wis. 644 (1874), and ***Blakely v. Carter***, 70 Wis. 540, 36 N.W. 329 (1888). The Sowls' reliance on both these cases is misplaced.

¶17 The legal issue in ***Andrews*** was whether possessing a note and mortgage is prima facie evidence that an individual owns the instruments and, as such, has standing to enforce them, without proof of assignment of the note to that individual. ***Andrews***, 35 Wis. at 650. In that case, a railroad company came into possession of a note and mortgage containing certain terms of repayment. ***Id.*** at 645-46. The railroad company later issued a bond assigning the power to enforce the note and mortgage to a third party or "*bearer*." ***Id.*** at 646. The bond was transferred several times before coming into possession of the plaintiff, purportedly attached to the note and mortgage. ***Id.*** at 647. The plaintiff brought a foreclosure action seeking to enforce the terms of the bond. At trial, the defendants challenged the plaintiff's right to enforce the bond, on the grounds that the allegations set forth in the complaint regarding the terms of the note and mortgage were at variance with the terms for repayment provided in the note and mortgage submitted as evidence by the plaintiff, and that the terms in the actual

bond were at variance with the terms in the actual note and mortgage. ***Id.*** at 648-49. The trial court concluded that the variances were material and gave the plaintiff twenty days to amend her complaint. ***Id.*** at 649. However, the plaintiff chose not to amend her complaint and the circuit court dismissed the case. ***Id.***

¶18 On petition to the supreme court, the plaintiff argued that possession of the note and mortgage was prima facie evidence that she owned them, and that it was not necessary that she prove by way of affidavit or otherwise that the note and the mortgage were assigned to her in order to enforce her rights under the note. ***Id.*** at 650. The supreme court rejected the plaintiff's argument because "[t]he note is payable to the railroad company *or order*," rather than to "bearer" and was unendorsed, rather than endorsed in blank. ***Id.*** at 650-51. The supreme court noted that the plaintiff did not aver in her complaint that she was the owner of the note and mortgage offered in evidence but claimed she owned the note and mortgage by virtue of the assignment of the bond to her. ***Id.*** at 651. The court ruled that mere possession of the unendorsed noted payable to "order" was not prima facie evidence of ownership. ***Id.*** The court also noted that the terms of the bond were at variance with the terms set forth in the note and mortgage and therefore did not support the plaintiff's allegation that she owned the note and mortgage. ***Id.*** at 650-51.

¶19 ***Blakely*** was a foreclosure action commenced by Blakely's heirs against Carter, to enforce a note and mortgage executed by Carter to the administrator of Blakely's estate. ***Blakely***, 70 Wis. at 540-41. At issue was whether the heirs, seeking to foreclose on the property, owned the note and mortgage and therefore could enforce them. ***Id.*** at 541-42. In his capacity as administrator of Blakely's estate, the administrator had taken a mortgage and note from Carter to secure a loan made by the administrator from funds belonging to

the estate. ***Id.*** at 541 The administrator settled the estate and distributed to the heirs their shares of the estate, except the note and mortgage sought to be foreclosed on in this action. ***Id.*** The heirs rejected distribution of the note and mortgage to them and neither instrument was ever transferred to any of the heirs. ***Id.*** The administrator of the estate therefore took ownership of the note and mortgage. ***Id.*** at 541-42. However, a number of years later, one of the heirs requested that the estate administrator give over the note and mortgage. ***Id.*** The administrator did so, but without endorsing the note. ***Id.*** The circuit court dismissed the action on the ground that, when the heirs refused to accept the note and mortgage, the administrator became the owner of the note and mortgage. ***Id.*** at 542.

¶20 On appeal, the supreme court affirmed the circuit court's dismissal of the foreclosure action. ***Id.*** at 542-43. The supreme court held, based on the circuit court's unchallenged findings of fact, that the administrator of the estate owned the note and mortgage executed by Carter because the heirs refused to accept the note and mortgage as a part of their share, and the administrator had paid to the heirs the amount due on the note. ***Id.*** The court also held that delivering the unendorsed note and mortgage to one of the heirs upon the heir's request did not affect the administrator's ownership of the note and mortgage. ***Id.***

¶21 Both ***Andrews*** and ***Blakely*** are distinguishable on their facts and neither addresses the issue here. In both cases, the note was not endorsed. Here, the note was endorsed in blank, entitling the holder of the note to enforce it. *See* ***Andrews***, 35 Wis. at 651 ("the possession of a promissory note payable to the order of the payee, and [e]ndorsed in blank by him, is prima facie evidence of ownership") (italics omitted). In addition, we do not read the supreme court in either case as purporting to establish a general rule that to have standing to enforce

a note, the holder of the note must show possession of both the note and the mortgage. Because the Sowls do not cite to any other authority supporting their position that standing to enforce a note requires that the holder of the note must also possess the mortgage, and our independent research has not uncovered any such authority, we reject this argument.

CONCLUSION

¶22 Based on the foregoing reasons, we affirm the circuit court's judgment granting summary judgment to OneWest.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.