COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2013

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. 2012AP2109 **Cir. Ct. No. 2011CV3118**

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

BANK OF AMERICA, N.A., AS SUCCESSOR BY MERGER TO COUNTRYWIDE HOME LOANS SERVICING, L.P., N/K/A BOA HOME LOANS SERVICING, L.P.,

PLAINTIFF-RESPONDENT,

V.

DEBRA S. RASCHKE AND JOHN H. RASCHKE,

DEFENDANTS-APPELLANTS,

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., BANK OF AMERICA, N.A., AS NOMINEE FOR COUNTRYWIDE BANK, N.A. AND DISCOVER BANK,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. In this foreclosure action, Debra S. and John H. Raschke appeal from a grant of summary judgment in favor of Bank of America, N.A.[1] The Raschkes argue that the circuit court erred in dismissing their counterclaims and sua sponte entering a judgment of foreclosure against them. We disagree and affirm.

¶2 The Bank is a successor by merger to Countrywide Home Loans, Inc., with which the Raschkes signed and executed a note and mortgage in 2007. They fell behind on their payments in 2009 and applied for a loan modification under the federal Home Affordable Modification Program (HAMP). The Raschkes were put on a trial period plan (TPP) while their application was processed. They made one timely TPP payment in August 2009; their second was returned for insufficient funds. They were told they would have to pay $7,015.15

[1] The statement of facts in an appellate brief must contain "appropriate references to the record" and the argument must be supported by citations to "parts of the record relied on." WIS. STAT. RULE 809.19(1)(d), (e) (2011-12). Many citations in the Bank's brief are to the appendix only. The appendix is not the record. ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322. Also, the Bank's citations to the record are wildly incorrect. Erroneous record references place an unwarranted burden on this court in deciding an appeal. ***Meyer v. Fronimades***, 2 Wis. 2d 89, 93-94, 86 N.W.2d 25 (1957). Finally, the Bank's citation to ***Crawford v. Marina Development LLC***, No. 2006AP463, unpublished slip op. (Nov. 8, 2007), violates RULE 809.23(3)(a).

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

by the end of February 2010 to remain eligible for HAMP consideration. They did so, then paid no more.

¶3 The Raschkes filed for Chapter 7 bankruptcy in 2010. After their discharge they again applied for a loan modification. In March 2011, the Bank approved them for its in-house modification program under Fannie Mae and the Raschkes sent the first TPP payment. The Raschkes claim a Bank employee verbally told them they also had been approved for a HAMP modification and written confirmation would follow. Preferring that program, but without formal notice from HAMP, the Raschkes stopped payment on the Fannie Mae check.

¶4 In May 2011 the Raschkes learned they did not qualify for a permanent HAMP loan modification due to their trial plan default and their debt-to-income ratio. With Debra now unemployed, the Raschkes' financial situation also had changed. They again applied for a HAMP modification but did not resume making mortgage payments. About six months later, a Bank employee allegedly told Debra in a telephone call that they had not been considered for a HAMP modification at all during 2011.

¶5 The Bank then commenced this foreclosure action. The Raschkes filed an answer with affirmative defenses of estoppel, lack of standing, that the Bank was not a real party in interest, and that it failed to process the loan

modification. They also asserted counterclaims of promissory estoppel and misapplication of payments.

¶6 The Bank moved to dismiss the counterclaims; the Raschkes filed a brief and an affidavit of Debra in opposition. At the hearing on the motion to dismiss, the circuit court observed that, as the matter "may morph from a motion to dismiss into a motion for summary judgment," it would adjourn the hearing. Both parties filed additional briefs. At the adjourned hearing on July 16, 2012, the circuit court dismissed the Raschkes' counterclaims and, of its own accord, granted summary judgment on the Bank's complaint. The Bank then filed the affidavit of Bank assistant vice president Tyler Dolanch in support of a motion for a foreclosure judgment ("Dolanch Affidavit"). The judgment indicates that the court reviewed it before rendering judgment on August 8. The Raschkes appeal.

¶7 The Raschkes contend the circuit court improperly dismissed their counterclaims and sua sponte granted summary judgment on the foreclosure complaint. One complaint is that the circuit court provided insufficient notice to convert the Bank's motion to dismiss to a motion for summary judgment.

¶8 Under WIS. STAT. § 802.06(2)(b), a circuit court may treat a motion to dismiss a complaint for failure to state a claim as one for summary judgment when matters outside of the pleadings are presented to the court. *See*, *e.g.*, ***Swan Sales Corp. v. Joseph Schlitz Brewing, Co.***, 126 Wis. 2d 16, 19 n.1, 374 N.W.2d

640 (Ct. App. 1985). A court must give parties notice of the conversion from a motion to dismiss to one for summary judgment and an opportunity to present countervailing evidence. ***CTI of Ne. Wisconsin, LLC v. Herrell***, 2003 WI App 19, ¶8, 259 Wis. 2d 756, 656 N.W.2d 794. The notice must be "reasonable," *i.e.*, sufficient to inform the nonmoving party of the possible conversion so that they are not taken by surprise. ***Alliance Laundry Sys. LLC v. Stroh Die Casting Co.***, 2008 WI App 180, ¶20, 315 Wis. 2d 143, 763 N.W.2d 167. "[T]he court need inform the parties only that it *could*, as opposed to *would*, treat the motion as one for summary judgment." ***Id.***

¶9 Here, the circuit court plainly advised the parties that Debra's affidavit, which added materials beyond the scope of the pleadings, could cause the motion to dismiss to become one for summary judgment. The Raschkes' claim of surprise falls flat.

¶10 Another complaint is that the court should not have sua sponte granted summary judgment. We disagree. A circuit court has the inherent authority to consider issues sua sponte. *See* ***State v. Holmes***, 106 Wis. 2d 31, 39-41, 315 N.W.2d 703 (1982). Objections are "diminished or eliminated by the circuit court giving the litigants notice of its consideration of the issue and an opportunity to argue the issue." ***Id.*** at 41. The Raschkes had notice and availed themselves of the opportunity to address their standing and real-party-in-interest defenses in Debra's affidavit; estoppel and failure to process their loan

modification were addressed with the dismissal of their counterclaims. That the grant of summary judgment was sua sponte demonstrates no error.

¶11 The grant of summary judgment itself we review de novo, applying the same methodology as the circuit court. ***M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). Summary judgment shall be granted when the affidavits and other submissions show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶12 The Raschkes alleged a counterclaim of promissory estoppel and an affirmative defense of equitable estoppel. Promissory estoppel involves three elements: (1) whether the promise is one that the promisor reasonably should expect to induce action or forbearance of a definite and substantial character on the part of the promisee; (2) whether the promise induced such action or forbearance; and (3) whether injustice can be avoided only by enforcing the promise. ***Hoffman v. Red Owl Stores, Inc.***, 26 Wis. 2d 683, 698, 133 N.W.2d 267 (1965). Equitable estoppel has the additional element of resulting detriment. *See* ***Milas v. Labor Ass'n of Wis., Inc.***, 214 Wis. 2d 1, 11-12, 571 N.W.2d 656 (1997).

¶13 The Raschkes alleged that the Bank promised a loan modification after a three-month trial period of lower payments, that it reasonably should have expected they would rely upon and agree to the lower payments, that the promise

of a modified loan induced them to start making lower payments and ultimately put them into default, and that the only way to avoid injustice is to require the Bank to give them a loan modification.

¶14 The Raschkes give two examples of the Bank's "promise," a January 26, 2010 letter from the Bank thanking them for participating in HAMP and a telephone conversation with an unnamed Bank employee who Debra averred verbally confirmed approval of a HAMP loan modification. Neither persuades us.

¶15 The opening sentence of the letter must be read in context:

> Thank you [for] your participation in the federal government's Home Affordable Modification Program. *In order to receive* a permanent Home Affordable Modification and to comply with the terms of your trial modification, you must make trial period payments in the amount of $1,403.03 each month during the trial period …. Our records reflect that we have not received all of your trial period mortgage payments. As a result, you are at risk of losing *your eligibility* for a permanent Home Affordable Modification.
>
> …. To date, we have received 1 trial period payment(s) out of 6…. The program requirements outlined by the federal government include that you must have made all your trial period payments *to qualify* for a final loan modification. (Emphasis added.)

The letter did not promise that the Raschkes *would* receive a permanent modification if they made the required TPP payments. Rather, it advised that doing so made them eligible for consideration.

¶16 Similarly, even assuming a Bank employee verbally represented that the Raschkes were approved for a HAMP modification, Debra acknowledged also

being told that they would receive written confirmation. Indeed, they made their first Fannie Mae TPP payment only after receiving written approval. We agree that it was not reasonable to rely on the letter or verbal communications to abort the Fannie Mae modification without written confirmation from HAMP.

¶17 Furthermore, the Raschkes have paid only $8,418.18 of the nearly $259,000 they owe the Bank. Thus, it was not their *making* lower payments on a "promise" of a modified loan that led to default; it was their *not* making payments. Also, their bankruptcy filing interrupted the application process and the Raschkes since have reapplied. It is difficult to see what detriment flowed from any Bank actions. Enforcing the alleged promise would allow, not avoid, injustice. The promissory estoppel counterclaim was properly dismissed.

¶18 The Raschkes' misapplication-of-payments counterclaim also was properly dismissed. Debra averred in her affidavit that, on information and belief, the Bank maintained payments in a suspense account or applied them to late charges and fees before interest and principal, as the mortgage and note required. Affidavits must be made on personal knowledge. WIS. STAT. § 802.08(3). If made on information and belief, they lack the necessary evidentiary stature and so are insufficient for summary judgment purposes. *See* ***Leszczynski v. Surges***, 30 Wis. 2d 534, 538, 141 N.W.2d 261 (1966).

¶19 The Raschkes next contend the Bank did not make a prima facie case for judgment on their affirmative defenses because, at the time judgment was granted at the hearing, the Bank had not introduced any admissible evidence. Because the Dolanch Affidavit was submitted after judgment was granted, they assert that it was too late to assist the Bank's proof and the circuit court should have disregarded it.

¶20 A circuit court has the discretionary authority to "permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." WIS. STAT. § 802.08(3). Although failure to object waives the right to complain on appeal, *see* ***Dairyland Equip. Leasing, Inc. v. Bohen***, 94 Wis. 2d 600, 605-06, 288 N.W.2d 852 (1980), we will consider the issue.

¶21 The Raschkes correctly assert that summary judgment must be based on evidence available at the time the judgment is rendered. WIS. STAT. § 802.08(2). They are incorrect, however, that the judgment was rendered at the adjourned hearing. As an oral pronouncement, the judgment was *granted* at that hearing. *See* WIS. STAT. § 806.06(1)(d). "A judgment is *rendered* by the court when it is signed by the judge or by the clerk at the judge's written direction." WIS. STAT. § 806.06(1)(a) (emphasis added). We conclude the Dolanch Affidavit was available for the circuit court's consideration.

¶22 Beyond that, copies of the note and mortgage and their assignments to the Bank through a series of entities were appended to the complaint. The Dolanch Affidavit included a copy of the note, the Raschkes' payment history and the amount still owed on their loan. The Raschkes do not claim that any of the documents are inaccurate or inauthentic. An abbreviated payment history, also undisputed, was put on the record at the adjourned hearing and their answer acknowledged their default. The Dolanch Affidavit is not critical to a determination that the Bank stated a prima facie case for foreclosure.

By the Court.—Judgment affirmed.

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