COURT OF APPEALS
DECISION
DATED AND FILED

June 11, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1482 **Cir. Ct. No. 2011CV2591**

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

SCOTT P. MATTFELD AND SHELLEY MATTFELD,

PLAINTIFFS-APPELLANTS,

V.

PHH MORTGAGE CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Scott P. and Shelley[1] Mattfeld appeal from a judgment and order[2] denying their motion for summary judgment and granting

[1] Shelley was not a party to the complaint below; she was added as a party to the appeal by this court's order dated August 10, 2012.

summary judgment to PHH Mortgage Company (PHH), thereby dismissing the Mattfelds' claims. The Mattfelds contend that PHH violated its statutory obligation under WIS. STAT. § 138.052(7s)(a) (2011-12)[3] to timely supply them with the payoff amount for their mortgage. The Mattfelds also believe that PHH violated an implied contractual duty of good faith and fair dealing. We conclude that § 138.052(7s)(a) is unambiguous and does not require what the Mattfelds claim and, further, there was no contractual obligation that PHH breached. The circuit court's grant of summary judgment to PHH was therefore appropriate, so we affirm.

BACKGROUND

¶2 The Mattfelds owned a home in Menomonee Falls, subject to two mortgages. PHH held the first mortgage. The Mattfelds found a prospective buyer for the home and hoped to close the sale on January 8, 2009. On December 29, 2008, Brenda Haas of Shorewest Realty sent a fax to PHH, requesting PHH email or fax her the payoff amount for the first mortgage. On January 5, 2009, Haas emailed PHH's attorney, Brent Nistler, with the same request, though in this correspondence, she indicated that she expected a $68,000 shortfall after the sale.

¶3 Nistler responded on January 6, 2009, and informed Haas that in order for the Mattfelds to be considered for what was evidently going to be a short

[2] The order appealed from is dated May 24, 2012, and ordered the disposition of the summary judgment motions. The subsequent judgment dated June 28, 2012, confirmed dismissal of the Mattfeld claims and awarded costs to PHH.

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

sale, they would have to go through PHH's loss mitigation department. Several emails between Haas and Nistler were exchanged.[4] Haas ultimately indicated that the Mattfelds would have to go through the short sale process.

¶4 Because of repeated delays in closing, the prospective purchaser exercised his right to cancel the sale contract on March 19, 2009. On March 31, 2009, PHH mailed the Mattfelds a notice of their mortgage payoff amount.

¶5 Scott Mattfeld commenced the underlying action against PHH for damages from the lost sale. He alleged that PHH failed to comply with WIS. STAT. § 138.052(7s) by failing to provide, within fifteen days of the January 5, 2009 inquiry, a response that included the Mattfelds' payoff amount. He also alleged that PHH breached an "implied duty of good faith and fair dealing in the performance of the loan contract" when it failed to timely provide such notice.

¶6 Mattfeld moved for summary judgment on the statutory claim. PHH filed a cross-motion for summary judgment on the statutory claim and also sought summary judgment on the contract issue. The circuit court ultimately concluded that the email response PHH provided to Haas regarding the short sale process was sufficient. Thus, it denied Mattfeld's motion for summary judgment and granted PHH's motion on both claims. Mattfeld's reconsideration motion was also denied. The Mattfelds appeal.

[4] Also participating in the email volley was Tracy Johnson from an "outsourcing company," but no further mention of her is made relative to the appeal.

DISCUSSION

I. STANDARDS OF REVIEW

¶7 "We review summary judgment motions de novo, applying the same methodology as the [circuit] court." ***Brown v. Acuity***, 2012 WI App 66, ¶5, 342 Wis. 2d 236, 815 N.W.2d 719. The methodology is well-established, so we will not repeat it here. For our purposes, it suffices to say that summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* ***id.*** That the parties filed cross-motions for summary judgment without seriously disputing each other's factual claims creates a practical effect of stipulated facts. *See* ***Selzer v. Brunsell Bros., Ltd.***, 2002 WI App 232, ¶11, 257 Wis. 2d 809, 652 N.W.2d 806.

¶8 The main issue on appeal is the interpretation and application of WIS. STAT. § 138.052(7s)(a). Statutory interpretation is a question of law that we review *de novo*.[5] *See* ***Landis v. Physicians Ins. Co. of Wis., Inc.***, 2001 WI 86, ¶13, 245 Wis. 2d 1, 628 N.W.2d 893. Application of a statute to undisputed facts is also a question of law. ***Id.***, ¶12.

¶9 "The purpose of statutory interpretation is to discern the intent of the legislature." ***Id.***, ¶14. Statutory interpretation "'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" ***Kalal v. Circuit Ct. for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681

[5] For this reason, it is unnecessary for us to consider the Mattfelds' complaint that the circuit court erroneously exercised its discretion when it failed to adequately explain why it refused to follow the Mattfelds' statutory construction. *See* ***Georgina G. v. Terry M.***, 184 Wis. 2d 492, 507, 516 N.W.2d 678 (1994) (application of statute to facts is question of law; hence, "we need not give deference" to circuit court decision).

N.W.2d 110 (citation omitted). "Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation[.]" ***Id.***, ¶46. "[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." ***Id.***, ¶47.

II. THE WIS. STAT. § 138.052 CLAIM

¶10 WISCONSIN STAT. § 138.052(7s)(a) provides, in relevant part: "A person who receives loan or escrow payments on behalf of itself or another person shall … [r]espond to a borrower's inquiry within 15 days after receiving the inquiry."[6] On appeal, the Mattfelds contend that, under § 138.052(7s): (1) a response to the borrower's inquiry must be sent to the borrower, not an agent; (2) the response cannot be just any response but must specifically answer the question posed; (3) the response must be in writing and email will not suffice; and (4) the reply must be made by mail or personal service to comply with the "delivery requirement" of the statute. Based on this interpretation of the statute, the Mattfelds contend that Attorney Nistler's emailed responses to realtor Haas, directing the Mattfelds to the short sale process, do not suffice. Further, because they received no paper notice of their payoff amount until March 31, 2009, the

[6] WISCONSIN STAT. § 138.052(7s) in its entirety states:

> A person who receives loan or escrow payments on behalf of itself or another person shall do all of the following:
>
> (a) Respond to a borrower's inquiry within 15 days after receiving the inquiry.
>
> (b) Consider that a loan payment by check, or other negotiable or transferable instrument, is made on the date on which the check or instrument is physically received, except that the person may charge back an uncollected loan payment.

Mattfelds assert that PHH failed to fulfill its statuary obligation to respond to the borrower within fifteen days.

A. PROPER RESPONSE RECIPIENT

¶11 The Mattfelds contend that under WIS. STAT. § 138.052(7s)(a), a response to the borrower's inquiry must be sent to the borrower in order to be compliant. The statute is silent regarding to whom the response should be sent. The Mattfelds make no compelling argument against, and we see no reason why the statute should be read to foreclose, use of an agent.

¶12 To the extent that the Mattfelds rely on the words "borrower's inquiry" as support for a claim that the response always must go to the borrower, they overlook the fact that in this case, the borrower did not make the inquiry. If a borrower's agent cannot *receive* the lender's response under WIS. STAT. § 138.052(7s)(a), neither then is the borrower's agent authorized to *make* the borrower's inquiry. Under that interpretation, we would have to conclude that the Mattfelds made no inquiry on January 5, 2009.[7]

¶13 The Mattfelds do contend that, in fact, Shelley Mattfeld made an inquiry. They point to the December 29, 2008 fax. However, this fax was a request by Haas, on Shorewest Realty letterhead, asking that the payoff amount be faxed or emailed *to the realtor*. Shelley Mattfeld's signature at the bottom does not directly follow Haas's request for information from PHH but, rather,

[7] Scott Mattfeld's complaint alleged only a failure of PHH to respond within fifteen days of the January 5, 2009 request. Thus, although the Mattfelds refer to requests sent on January 22 and 27, 2009, there is no further argument for us to review with respect to those requests.

authorizes PHH "to release information on undersigned Seller's accounts *to Shorewest Realtors*." (Emphasis added.)

¶14 We therefore see no reason why, under the language of the statute, the law of agency, and the facts of this case, it was improper for PHH to respond by replying to Haas rather than the Mattfelds. When an inquiry is made of the lender by someone with the authority to make the query, it is logical for the lender to assume that the response should be given to the person making the request. Therefore, we do not think the lender's response to an inquiry made by a borrower's agent is improper simply because it is delivered to that agent.

B. NATURE OF THE RESPONSE

¶15 The Mattfelds also contend that a "response" must be an "in kind" response that directly answers the inquiry posed. They argue that it makes no sense to interpret the statute so that "any response, even an absurd or unreasonable response, fulfills the statutory mandate."

¶16 However, this is not a case where the response was absurd or unreasonable. For whatever reason—and that reason appears to be Haas's anticipation of a $68,000 shortfall—PHH evidently concluded that no payoff amount could be determined or authorized until the Mattfelds had discussed the pending sale with the loss mitigation department. PHH provided an answer addressing that reality, in effect telling the Mattfelds the next necessary steps to take in order for PHH to ultimately calculate the payoff. We agree with the circuit court that, upon consideration of all the circumstances, PHH's answer was a sufficient "response" under the statute.

C. SERVICE AND FORM REQUIREMENTS

¶17 Finally, the Mattfelds assert that the response cannot be provided by email but, rather, must be in writing. They also contend that the response must be delivered to the borrower by mail or personal service.

¶18 We disagree. The language of WIS. STAT. § 138.052(7s)(a) is clear: "A person who receives loan or escrow payments on behalf of itself or another person shall … [r]espond to a borrower's inquiry within 15 days after receiving the inquiry." There are no requirements imposed as to form or delivery.

¶19 The Mattfelds believe, however, that WIS. STAT. § 138.052(7s) must be read *in pari materia* with § 138.052(7m). "*In pari materia* refers to statutes relating to the same subject matter or having the same common purpose." *See* ***Georgina G. v. Terry M.***, 184 Wis. 2d 492, 512 n.13, 516 N.W.2d 678 (1994). "'When multiple statutes are contained in the same chapter and assist in implementing the chapter's goals and policy, the statutes should be read *in pari materia* and harmonized if possible.'" ***Id.*** at 512 (citation and footnote omitted).

¶20 WISCONSIN STAT. § 138.052(7m) states:

> (a) A lender shall notify the borrower as provided in par. (b) if on or after May 3, 1988, the payment, collection or other loan or escrow services related to the loan are sold or released.
>
> (b) The notice required under par. (a) shall be in writing and shall include the name, address and telephone number of the party to whom servicing of the loan is sold or released. The lender shall deliver the notice to the borrower by mail or personal service within 15 working days after servicing of the loan is sold or released.

By reading § 138.052(7m) and (7s) *in pari materia*, the Mattfelds would transfer the "in writing" and "deliver[y]… by mail or personal service" requirements of

§ 138.052(7m)(b) to the timely response requirement of § 138.052(7s)(a). This reading is not consistent with the *in pari materia* requirement of the same subject matter. Here, the reference in subsec. (7m) is to notice of the sale or transfer of the loan. The "timely response" reference in subsec. (7s) is to any inquiry of a borrower. They are not the same.

¶21 The only thing that WIS. STAT. § 138.052(7m) and (7s) have in common is their placement in a statutory section entitled "Residential mortgage loans." (Boldface omitted.) They do not share the same subject matter: subsection (7m) details the information that a lender must provide to the borrower if it transfers the loan to someone else, and subsection (7s) imposes two requirements on lenders for dealing with borrowers, regarding timely responses to inquiries and processing of certain payment forms. Although "'courts must not look at a single, isolated sentence or portion of sentence, but at the role of the relevant language in the entire statute,'" ***Landis***, 245 Wis. 2d 1, ¶16 (citation omitted), there is nothing special about the juxtaposition of § 138.052(7m) and (7s) that requires us to read them together. Indeed, subsections (7m) and (7s) are no more similar to each other than (7m) is to the preceding (7e) or (7s) is to the following (8).[8]

¶22 Even were we to subscribe to the need to apply *in pari materia* as a canon of construction here, we would also have to consider that we generally presume words excluded from a statute are excluded for a reason. That is, we

[8] WISCONSIN STAT. § 138.052 has unusual numbering: in sequence, the subsections include (7), (7e), (7m), (7s), and (8). Subsection 138.052(7e) details a lender's obligations when it takes "adverse action" on a loan application and sets out what information must be in a written disclosure prior to accepting an application, and § 138.052(8) identifies certain types of loans to which § 138.052 does not apply.

generally do not construe statutes so as to add words. *See* ***C. Coakley Relocation Sys., Inc. v. City of Milwaukee***, 2008 WI 68, ¶24 n.10, 310 Wis. 2d 456, 750 N.W.2d 900. Thus, because "written notice" is required by multiple other sub-sections[9] of WIS. STAT. § 138.052, but not § 138.052(7s), we would presume that the legislature intentionally chose not to include it in § 138.052(7s), which requires a timely response to inquiries. Therefore, we will not read a written notice requirement into § 138.052(7s), nor will we read in a mail or personal service requirement.

¶23 In short, WIS. STAT. § 138.052(7s) is plain and unambiguous.[10] It prescribes no form for a response and it imposes no "delivery requirement." The circuit court properly determined that PHH's email, from counsel to the realtor, on January 6, 2009, was an appropriate and timely response under the statute, and that PHH was entitled to summary judgment on this claim.

III. THE CONTRACT CLAIM

¶24 The other claim against PHH was a breach of contact claim. The relevant portion of the complaint alleged:

> Defendant had an implied duty of good faith and fair dealing in the performance of the loan contract with the plaintiff, specifically, to timely provide plaintiff *or his representatives*[11] with a loan payoff. [Emphasis added.]

[9] *See, e.g.*, WIS. STAT. § 138.052(5m)(b)1.-2.; (5m)(e); and (7e)(a)-(b).

[10] We therefore have no need to review "lemon law" jurisprudence as an interpretive aid.

[11] We cannot help but note this inconsistency in the Mattfelds' pleading.

On appeal, the Mattfelds assert that this duty derives from Section 8 of an adjustable rate note and from Section 15 of the mortgage. These provisions state, in relevant part:

> **8. GIVING OF NOTICES**
>
> Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.
>
> ….
>
> **15. Notices.** All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means.

However, the Mattfelds simply do not show that confirmation of the loan payoff amount is a "notice that must be given" under the adjustable rate note or that the payoff amount is a notice "in connection with" the mortgage.

¶25 The Mattfelds argue that "[e]very homeowner expects that their mortgage lender will promptly cooperate in providing a loan payoff statements so that sale or refinance of their properly will timely occur."[12] That expectation cannot trump the above-quoted portions of their note and mortgage. The Mattfelds have established no basis for their breach of contract claim. Summary judgment to PHH on the contract claim was appropriate.

[12] We observe that the Mattfelds may have been fated to experience delays from the outset: they made their first inquiry for the payoff amount on December 28, 2008, and expected to close on January 8, 2009. However, under the statute, a response from PHH was not even required until January 12, 2009. This deadline is even later if counted from the January 5 request.

By the Court.—Judgment and order affirmed.

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