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DISTRICT IV

September 22, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2015AP830 JPMorgan Chase Bank National Association v. Brian D. Seamonson and Melissa Seamonson (L.C. # 2012CV1946)

Before Lundsten, Sherman and Blanchard, JJ.

Brian and Melissa Seamonson appeal a summary judgment granting foreclosure and dismissing their counterclaims. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21

(2013-14).[1] The dispositive issue is whether a disputed issue of material fact exists regarding JPMorgan Chase Bank's possession of the original promissory note and endorsement so as to preclude summary judgment. We conclude that there is a disputed issue of fact. We summarily reverse the judgment, and remand for further proceedings.

We review the circuit court's grant of summary judgment independently and using the same methodology as the circuit court. ***Wegner v. Heritage Mut. Ins. Co.***, 173 Wis. 2d 118, 123, 496 N.W.2d 140 (Ct. App. 1992). There is no need to repeat the well-known methodology; the controlling principle is that, when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. ***Id.***; WIS. STAT. § 802.08(2). "In evaluating the evidence, we 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.

Chase attached to its complaint a note and mortgage signed by Brian Seamonson in November 2006 in favor of Fremont Investment & Loan. The complaint alleged that Chase is the lawful holder of the note and mortgage and that the Seamonsons defaulted on the note in February 2011. The Seamonsons denied the allegations of the complaint, and asserted that there was no valid assignment of the note and that Chase does not own the note.

Chase moved for summary judgment. Chase supplied an affidavit from Chase employee Richardra Winder. Attached to that affidavit was a copy of the note and mortgage which Winder averred included "an allonge endorsed in blank from Fremont Investment & Loan" and was

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

identical "to the image of the original Note in Chase's system." Winder also averred that "Chase, by or through its counsel, is in possession of the original Note." In their trial brief in opposition to the motion for summary judgment, the Seamonsons pointed out that copies of the note filed with the court varied in whether they included a "snail" in the upper right corner of the first page, a bar code at the bottom of the first page, an endorsement from Fremont Investment & Loan, and two holes at the top of the pages. They argued that Winder's affidavit did nothing more than establish that Chase had different images of the note in Chase's computer system and that it remained unknown whether Chase possessed the original paper note bearing an endorsement. In reply, Chase filed an affidavit from its attorney indicating that the attorney was in possession of the original note and that the copy of the note attached to the Winder affidavit was a true and correct image of the note in his possession. The attorney's affidavit also attached a copy of the original note in the attorney's possession.

The Seamonsons then filed an affidavit from Michael Hilla. Hilla averred that he had extensive experience and personal knowledge of Fremont Investment & Loan's policies and procedures regarding all aspects of a loan at Fremont, having worked at Fremont from 2004 until 2007, being promoted within Fremont, and eventually becoming a regional account executive for Fremont. As a regional account executive, Hilla oversaw about 120 offices in Wisconsin and Illinois that originated loans for Fremont. Hilla's affidavit explains that Fremont's process, after a loan was originated, was to have the loan documents, including the original promissory note, sent to Fremont's post-closing department. The post-closing department scanned the original note and other documents, using a process that produced "high quality" scans, that were saved in Fremont's computer system. After the documents were scanned, the original documents, including the original promissory note, were attached to what Hilla referred to as a "collateral

file" using a two-hole punch at the top of the documents and a two-hole clasp. Hilla averred that the documents were attached to the file this way so that the original documents would not be lost during transport or handling and that this "was especially important to ensure the original note did not get lost." Hilla explained that the collateral files would then be placed in boxes and sent to one of Fremont's storage vaults in California. Hilla averred that, as part of his post-closing duties, he would go to the storage vaults in California to meet with part of their team as loans were reviewed, that he would watch as the team went through boxes of collateral files and reviewed the loans, and that the collateral files they reviewed had the original documents attached to the files. Hilla averred, based on this experience and observation, that "an original note originated by Fremont would have punches from a 2-hole punch at the top" and that a "purported original note that does not have 2-hole punches at the top would not be the original note bearing the original signature(s) of the borrower(s)."

Chase sought judgment based on its possession of the original note as endorsed in blank and therefore payable to Chase as the holder. *See* WIS. STAT. § 403.201(2), 403.205(2). We will assume without deciding that one or both of the affidavits[2] submitted by Chase established a prima facie showing that Chase possessed the original note.[3]

[2] We express no opinion on the Seamonsons' suggestion that Chase's attorney cannot make factual assertions via an affidavit while actively representing Chase. We stress that we do not decide that such an attorney affidavit is appropriate for the purpose of supplying the type of evidence at issue here, but rather assume without deciding that Chase may rely on the affidavit for summary judgment purposes.

[3] We do not address the inconsistency between the copy of the original note attached to Winder's affidavit and that attached to the attorney's affidavit. Both affidavits stated that the attached copy of the note was a copy of the original note in Chase's possession. The copy of the original note attached to the attorney's affidavit included the snail and bar code image found on the note attached to the Winder affidavit but did not include the separate page with the endorsement from Fremont Investment & Loan.

We turn to the Hilla affidavit offered in opposition to summary judgment. We conclude that the Hilla affidavit supplies evidence that would permit a reasonable fact finder to find that the original note to which the subsequent endorsement would be attached would be two-hole punched. In particular, Hilla explained why there could be accurate *copies* of the original note, made at different points in time, both showing and not showing two-hole punches, and why only a copy showing the two-hole punches would be a copy of the original note in its current state. In other words, the evidence is such that a reasonable jury could make a finding in favor of the Seamonsons on the question of whether the document in the possession of Chase's attorney, without two-hole punches, was the original endorsed note. *See* ***Clay v. Horton Mfg. Co.***, 172 Wis. 2d 349, 353-54, 493 N.W.2d 379 (Ct. App. 1992). Thus, we reverse the summary judgment because, at least as the record now stands, it does not support summary judgment in favor of Chase.

The Seamonsons request that summary judgment be granted in their favor upon a finding that the original note is not endorsed. We do not provide that relief because the Seamonsons did not file a cross-motion for summary judgment. Moreover, the factual dispute that precludes summary judgment in Chase's favor also precludes summary judgment in the Seamonsons' favor. That is, there is evidence in both directions.

The Seamonsons also request that we remand with directions to the circuit court to reinstate their defenses and counterclaims. We need not give that explicit direction because we reverse the entire judgment, which includes the circuit court's rejection of the affirmative defenses and the dismissal of the counterclaims. *See* ***Prahl v. Brosamle***, 142 Wis. 2d 658, 665-66, 420 N.W.2d 372 (Ct. App. 1987) (reversal of summary judgment puts the case back into the trial process).

Before closing, we comment on rules violations by the attorney representing Chase. In the respondent's brief, the attorney does not include the public domain citation and the volume and page number of the Wisconsin Reports for its case citations as required by SCR 80.02. The brief violates WIS. STAT. RULE 809.19(3)(a)2., which incorporates the requirement in RULE 809.19(1)(e) that citations comply with SCR 80.02. More troubling is counsel's violation of citing an unpublished per curiam opinion of the Court of Appeals. Counsel is reminded that the rules of appellate procedure are mandatory, and that we may penalize attorneys for violations. *See* WIS. STAT. RULE 809.23(3)(b).

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily reversed and the cause is remanded for further proceedings pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals