

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 8, 2004

Cornelia G. Clark
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. 03-2211

Cir. Ct. No. 01CV001185

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**BANKERS TRUST COMPANY OF CALIFORNIA, N.A., AS
TRUSTEE OF CERTIFICATE HOLDERS OF BEAR STEARNS
ASSET BACKED SECURITIES, INC. ASSET BACKED
SECURITIES, SERIES 2000-1,**

PLAINTIFF-RESPONDENT,

v.

**JEFFREY SCOT GONIA, INDIVIDUALLY, AND AS
GUARDIAN FOR THE PERSON AND ESTATE OF STACEE
LYNNE GONIA, A MINOR, MICHELLE RENEE GONIA, A
MINOR, AND STEPHANIE ANNA GONIA, A MINOR,**

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Winnebago County:

T. J. GRITTON, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Jeffrey Scot Gonia and others (Gonia) appeal from an order of foreclosure. Gonia argues that the mortgagee, Bankers Trust Company of California, N.A., violated various provisions of WIS. STAT. ch. 428 (2001-02),¹ which governs debt collection practices involving first lien real estate mortgages. We reject Gonia's arguments under ch. 428 that the amended foreclosure complaint was insufficient, that Bankers Trust erroneously established an escrow account for insurance payments, that Bankers Trust took an unenforceable security interest in household furnishings and goods, and that the circuit court erroneously awarded attorney's fees to Bankers Trust. We conclude that the evidence was sufficient to grant Bankers Trust foreclosure, and Gonia did not timely object to the upward adjustment of costs and fees set out in a revised order and judgment of foreclosure and the notice of taxation of costs. We also conclude that Gonia's claims under the federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o (2004),² and WIS. STAT. ch. 138 are waived.³ We affirm the order.

¶2 Gonia mortgaged real estate to a predecessor in interest of Bankers Trust. Gonia defaulted on the payments, and Bankers Trust sought to foreclose the mortgage. The real estate was owned by Gonia's minor children, to whom he had transferred the property. Gonia is the guardian for the children's estate. The amended complaint alleged that Gonia did not make contractually required mortgage payments and owed amounts for taxes, insurance and attorney's fees.

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

² All references to the United States Code are to the 2004 version unless otherwise noted.

³ Gonia concedes in his reply brief that the WIS. STAT. ch. 138 claims are waived. We will not address them further.

¶3 Gonia's amended answer alleged that the complaint was defective under WIS. STAT. ch. 428 and that Bankers Trust breached the contract relating to the escrow account. The circuit court found that Bankers Trust complied with ch. 428 and granted an order of foreclosure.

¶4 On appeal, Gonia argues that Bankers Trust's amended complaint does not comply with WIS. STAT. § 428.105. Whether a complaint is sufficient presents a question of law which we decide independently of the circuit court. *Wausau Tile, Inc. v. County Concrete Corp.*, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999).

¶5 WISCONSIN STAT. ch. 428 applies to first lien real estate mortgages. WIS. STAT. § 428.101(3). WISCONSIN STAT. § 428.105 governs the contents of a creditor's complaint:

A complaint by a creditor to enforce a cause of action shall set forth specifically the facts constituting the alleged default of the customer, the amount to which the creditor is allegedly entitled and a summary of the figures necessary for computation of such amount, and shall be accompanied by an accurate copy of the writing evidencing the transaction.

¶6 We conclude that the amended complaint is sufficient under WIS. STAT. § 428.105. The amended complaint adequately sets forth the facts constituting Gonia's default. The complaint alleges that the debtor failed "to make contractual monthly mortgage payments as required," resulting in specific amounts due and owing to Bankers Trust. The amended complaint specifies the amount due (\$31,077.74) and breaks that amount down into the figures necessary to compute that amount (amounts for accrued interest, escrow deficit, miscellaneous contractual expenses, and attorney's fees). The complaint was also

accompanied by a copy of the mortgage and promissory note, accurate copies of the writings evidencing the transaction.

¶7 Gonia contends that the amended complaint should have provided more information about the parties' dispute regarding Gonia's alleged failure to pay for insurance and the escrow account established for that purpose even though Gonia had signed a nonescrow agreement. Gonia also contends that the miscellaneous contractual expenses cannot be fully calculated given the documentation attached to the complaint and that the attorney's fees were overstated.

¶8 Although Gonia argues that WIS. STAT. § 428.105 requires such additional information in the complaint and its supporting documents, we find no support for the notion that § 428.105 dispenses with the rule that Wisconsin is a notice-pleading state. *See Studelska v. Avercamp*, 178 Wis. 2d 457, 463, 504 N.W.2d 125 (Ct. App. 1993). Therefore, the amended complaint need not have set out every detail of the claim, as Gonia contends. *Id.* The amended complaint gave Gonia fair notice of the claims, the amounts sought, and the categories into which those amounts fell. The amended complaint complies with § 428.105.

¶9 Gonia next argues that Bankers Trust should not have established an escrow account for insurance and real estate taxes. While it is true that the initial mortgage transaction contained a Non-Escrow Notice, which provided that the borrower would not escrow funds for insurance and real estate taxes, Gonia defaulted when he did not insure the property. Bankers Trust then exercised its

rights under the mortgage to create an escrow account for this purpose and to collect advances for the insurance expense from Gonia.⁴

¶10 The circuit court found that Bankers Trust had the right to establish an escrow account in response to Gonia's failure to pay real estate taxes and insurance. Paragraph five of the mortgage requires the borrower to insure the property and if the borrower fails to maintain coverage, the lender may obtain coverage to protect its rights in the property as provided in paragraph seven of the mortgage. Paragraph seven states that the lender may do whatever is necessary to protect its interest in the property if the borrower fails to meet his obligations under the mortgage.

¶11 We also reject Gonia's claim that the inclusion of a 1-4 Family Rider⁵ as an addendum to the mortgage violated WIS. STAT. § 428.103(1)(d) which prohibits a creditor from taking a security interest in household goods and furnishings. Gonia argues that he should be compensated for the WIS. STAT. ch. 428 violation even though Bankers Trust did not attempt to enforce this security interest.

¶12 We disagree. WISCONSIN STAT. § 428.106(3) states that a lender does not violate WIS. STAT. ch. 428 if the lender shows by a preponderance of the

⁴ Gonia claims that portions of his regular mortgage payments were diverted to the escrow fund, putting him in default on his payments. He argues that he later provided proof of insurance and the escrow amounts were refunded to him. However, he also concedes that he did not pay his real estate taxes; Bankers Trust paid those taxes to protect its interest in the property. Therefore, under the mortgage, Bankers Trust had the right to establish an escrow account and to divert a portion of Gonia's monthly payment to that account, even if that put him in default on his payments.

⁵ The 1-4 Family Rider grants an assignment of rents and a security interest in household goods and furnishings.

evidence that the violation was not intentional. Bankers Trust asserts that the Rider was a form document used throughout the country, and Bankers Trust did not exercise its security interest in the household personal property. The circuit court found that Bankers Trust did not violate ch. 428. This finding of fact is not clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶13 Gonia objects to the amounts calculated as due and owing Bankers Trust. The court found the testimony of Bankers Trust’s representative more credible as to the amounts due and owing than that of Gonia. The circuit court was charged with determining the weight of the evidence and the credibility of the witnesses, and we will not overturn those findings unless they are clearly erroneous. *See Micro-Managers, Inc. v. Gregory*, 147 Wis. 2d 500, 512, 434 N.W.2d 97 (Ct. App. 1988). Additionally, Gonia did not object to these amounts in the circuit court within the period for objecting, and did not seek further relief in the circuit court relating to these amounts. This issue is waived. *First Bank (N.A.) v. H.K.A. Enters., Inc.*, 183 Wis. 2d 418, 426 n.10, 515 N.W.2d 343 (Ct. App. 1994) (we do not consider issues raised for the first time on appeal).

¶14 We reject Gonia’s arguments that Bankers Trust violated the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o. Gonia did not allege violations of this Act in his answer to the amended complaint. Rather, Gonia relies upon a letter sent by his counsel during trial to Bankers Trust’s counsel stating that the testimony to date had raised a FDCPA issue. But, thereafter, Gonia did not brief this issue or focus the circuit court’s attention on it during closing arguments. “[A] party must raise and argue an issue with some prominence to allow the trial court to address the issue and make a ruling.” *State v. Ledger*, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993). Here, Gonia did not do so, and the issue is waived. *First Bank*, 183 Wis. 2d at 426 n.10.

¶15 Finally, to the extent that Gonia challenges the circuit court's findings, we note that the circuit court found that the witness for Bankers Trust was more credible than Gonia when it came to calculating the amount due. This determination was for the circuit court to make.

By the Court.—Order affirmed.

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

